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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ADINA KADDEN,

4 Plaintiff,

5 v.

11 Civ. 4892 (SAS)

6 VISUALEX LLC,

7 Defendant.

8 -----x
9 New York, N.Y.
August 13, 2012
10:05 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 MARK RISK

15 Attorney for Plaintiff

16 EPSTEIN BECKER & GREEN

Attorneys for Defendant

17 BY: TRAYCEE E. KLEIN

18 MARGARET C. THERING

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(Case called)

THE COURT: Mr. Risk.

MR. RISK: Good morning, your Honor, Mark Risk, Mark Risk PC, for the plaintiff. With me is the plaintiff, Adina Kadden.

THE COURT: Ms. Klein.

MS. KLEIN: Good morning, your Honor. From Epstein Becker & Green, representing Visualex, the defendant.

MS. THERING: Ms. Thering representing Visualex, the defendant.

THE COURT: This is a technical aide?

MS. KLEIN: This is a technician. And Lillian Romano, the president of Visualex, as well as Gina Pastena from my office.

MR. RISK: I should add, your Honor, that's Virginia Hardwick, who is an employment lawyer practicing in New Jersey and Pennsylvania, a friend and colleague of mine.

THE COURT: Everybody is welcome. It's a public courtroom.

We are here to have this nonjury trial because apparently you are unable to settle this case. You really tried to do that. You really tried, folks?

MR. RISK: You'll have to ask the defendant, your Honor. It's my sense that defendants are not interested in a settlement.

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1 THE COURT: Ms. Klein, did you really try to settle
2 this case?

3 MS. KLEIN: We did really try early on.
4 Unfortunately, we are not able to.

5 THE COURT: You didn't try recently?

6 MS. KLEIN: No, we did not speak about settlement
7 recently.

8 THE COURT: Did I send you to a magistrate judge or
9 the court-annexed mediation program?

10 MS. KLEIN: You did, your Honor.

11 THE COURT: Magistrate judge?

12 MS. KLEIN: I believe we went to the magistrate. I
13 don't recall at the moment who it was, but we did go.

14 MR. RISK: In the fall we had a brief unsuccessful
15 meeting with Magistrate Judge Francis.

16 MS. KLEIN: Correct.

17 MR. RISK: To our disappointment.

18 THE COURT: You should have gone back recently.

19 Be that as it may be, if you are not interested, we
20 will do it the slow way.

21 I guess we will have opening statements. Short but to
22 the point.

23 MS. KLEIN: Your Honor, before we begin, I would like
24 to just make an application to the Court.

25 THE COURT: I thought I had all the pretrial motions

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1 that I am going to have. I set dates for motion in limine. We
2 had them. What kind of application? If it's anything
3 resembling a motion in limine, it's denied. What kind of
4 application.

5 MS. KLEIN: It is not, your Honor, a motion in limine.

6 THE COURT: We will see.

7 MS. KLEIN: In light of the fact it is the defendant's
8 burden, we request that the defendant get to go first.

9 THE COURT: That's a small point. It's usually
10 pleasant to go last. You want to go first, be my guest.

11 MR. RISK: We would like to go first, your Honor.

12 THE COURT: I am not going to get into that. You
13 agree it's her burden of proof to prove an exemption?

14 MR. RISK: Yes, your Honor.

15 THE COURT: Let her go first. Go ahead.

16 Ms. Klein, if you want to go first, go first.

17 MR. RISK: Your Honor, may I raise --

18 THE COURT: No. Can we get started on an opening
19 statement. We are not going to have a good day if we are going
20 to have just one thing. Your Honor, can I have one more thing?
21 Can we just be heard? No, that's not the way we try cases. We
22 try cases with opening statement. All she asked is that she go
23 first because she has the burden of proof.

24 MR. RISK: Your Honor has ruled. I wanted to ask if
25 we are trying the whole case or just liability today?

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1 THE COURT: The whole case.

2 MR. RISK: Fine.

3 THE COURT: Ms. Klein.

4 MS. KLEIN: Your Honor, would you like us to have
5 opening statements or just start with the evidence?

6 THE COURT: Did I not say twice already that I would
7 like to have opening statements? This is maybe the third time.
8 Can we have opening statements now.

9 MS. KLEIN: Good morning, your Honor.

10 As you're aware, this case involves whether or not the
11 position of a graphic consultant is an exempt position as that
12 job was performed at Visualex, a company that is located in
13 Dobbs Ferry, New York.

14 It is the defendant's position on multiple reasons
15 that the job of graphic consultant is an exempt position. We
16 believe that the evidence will show that the exemption is
17 applicable for many reasons. It is applicable specifically to
18 Ms. Kadden for the following reasons. Ms. Kadden falls under
19 the administrative exemption. She also falls under the
20 professional exemption under the learned provision, and she
21 also falls under the creative exemption. There is also, as
22 this Court understands, a combination exemption if one doesn't
23 exactly fit.

24 What matters here is the important facts regarding
25 what was her compensation. She was paid a steady salary. What

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Opening - Ms. Klein

1 were her primary jobs and duty? We believe the evidence will
2 show that her job required her to exercise discretion and
3 judgment, that she exercise creativity and imagination, that
4 she managed both internally and externally, meaning internally
5 the staff at Visualex as well as the clients on the outside,
6 and the expectations when she was doing the consulting work
7 that she was performing.

8 Your Honor, in summary, this is what this case about.

9 We then will, of course, if we need to, as has been
10 previously discussed with the Court, address the issues
11 concerning actual hours and good faith. At this point, your
12 Honor, I don't know if you want us to address this. However,
13 we believe that the classification of the consultant is in good
14 faith. According to the Department of Labor, a consultant is
15 an exempt employee, as well as all of the other steps that
16 Visualex took to make sure that in fact the position that Ms.
17 Kadden was performing falls and suggests nothing other than
18 good faith. Also, we believe, if we get to that point, based
19 on the recent decision of the Supreme Court, we also understand
20 that industry practice is relevant to show whether or not it
21 has been treated that way historically.

22 THE COURT: What Supreme Court case are you referring
23 to?

24 MS. KLEIN: GlaxoSmithKlein that just came out that
25 talks about the industry and the industry practice and the

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Opening - Ms. Klein

1 Department of Labor's position as to whether or not they take a
2 different position ultimately. But, again, we don't have the
3 situation where there is a different position. The Department
4 of Labor specifically says that a consultant position is
5 exempt. I know that's getting into the legal issues.

6 THE COURT: I want to make sure we are doing the same
7 thing. Is that Christopher v. SmithKlein Beecham, June 18,
8 2012. That's the case you are referring to?

9 MS. KLEIN: Yes, your Honor.

10 Your Honor, at this time we would be ready to proceed,
11 pending, of course, the plaintiff's opening.

12 THE COURT: One moment before we do it.

13 You can have a seat. Your adversary will make a brief
14 opening statement.

15 Mr. Risk.

16 MR. RISK: Your Honor, much of our case comes right
17 off the job description for the position that Ms. Kadden was
18 hired. When we began our case, I'll submit Exhibit 1, which is
19 defendant's admissions in response to our request for
20 admissions, which establishes that Visualex created the job
21 description and that it's an accurate description of the job.

22 Visualex can't make the education prong of the learned
23 profession exemption. The job description is almost from a law
24 school exam. It indicates that a graduate degree was
25 preferred, not required. It gives as examples, e.g., social

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Opening - Mr. Risk

1 sciences, law or, et cetera. By its terms, that doesn't make
2 the learned professional exemption.

3 As you will hear in the testimony, your Honor,
4 Visualex is an unusual workplace. And it's one I would best
5 describe as like a firehouse. They assist lawyers who are
6 trying cases and that means they may sit idly during the day
7 and work very late into the night when lawyers are on trial and
8 creating and revising demonstratives quickly.

9 The job description, Exhibit 2, is more than
10 theoretical because the evidence will show that Visualex
11 followed it in the people it actually hired for the position.

12 Kim Matthiesen, who was a graphics consultant in 2006,
13 had a master's degree in English literature, but had very
14 relevant industry experience, which is probably one of the
15 reasons she was hired.

16 Kim Nawyn had a master's degree and was at the
17 dissertation stage in criminal justice, and she was
18 Ms. Kadden's colleague there.

19 Ms. Romano, the senior and always graphics consultant
20 there, has a master's degree from Hofstra University in applied
21 research, which really, she will tell us, is industrial
22 psychology, which I understand to be the study of employees and
23 organizations and workplaces.

24 Heather Moran, who is on call and will come here to
25 testify, was a career paralegal with some graduate courses, but

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Opening - Mr. Risk

1 no graduate degree.

2 So the pattern of hiring does reflect that they meant
3 business in this job description. They carried it out exactly.

4 THE COURT: Did all these people earn more or less the
5 same salary?

6 MR. RISK: Their offer letters are more or less
7 identical and the salary never changed over five or six years,
8 75,000 dollars even.

9 THE COURT: Moran made it and she made that same
10 salary?

11 MR. RISK: Yes.

12 THE COURT: And Kim Nawyn made it, Moran made it?

13 MR. RISK: And Matthiesen.

14 THE COURT: Matthiesen.

15 MR. RISK: The offer letters, which we will show you,
16 your Honor, are virtually identical, the same template with
17 minor or no deviations, the principal one being that by the
18 time Ms. Moran was hired the offer letter no longer explicitly
19 provided for overtime.

20 THE COURT: Still 75?

21 MR. RISK: 75. The only benefit was health insurance,
22 which was 383 a month and the company was paying half of that.

23 THE COURT: You only addressed one of the three
24 exemptions so far?

25 MR. RISK: I don't have so much to say, your Honor,

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1 about the other two.

2 THE COURT: You addressed the learned profession, but
3 you didn't address creative, professional, and administrative.

4 MR. RISK: I will, your Honor.

5 Visualex employs about ten people, all at relevant
6 times, and four or five of them are professional graphics
7 people. There are two job categories. There are graphic
8 designers supervised by art directors. As Visualex will tell
9 you, I think, these are serious people. They are professional
10 graphic artists, the designers are, and, even more so, the art
11 directors who supervise them. They had Adobe Illustrator
12 software and they created the graphics. Ms. Kadden and
13 Ms. Romano don't even have that software on their computer

14 THE COURT: What do they do?

15 MR. RISK: Ms. Kadden will testify that her job is to
16 talk to the lawyers about revisions to the graphics, go back to
17 the people in the studio, the designers and art directors, and
18 communicate the revisions, and it goes around and around and
19 around, often late at night, until the final graphics are
20 agreed on. Ms. Kadden interfaces with the lawyers and takes
21 the changes.

22 There are two consultants assigned to every matter as
23 a matter of Visualex policy. Ms. Romano, whose hourly rate is
24 considerably higher, is typically the senior one, and she goes
25 to the initial meeting with the client and talks about the

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Opening - Mr. Risk

1 strategy and generally sketches out the prototype of what the
2 graphics will be.

3 The backup consultant, as Visualex calls it, comes on
4 the revision stage. And there is rounds and rounds and rounds
5 of quality control, multiple proofs of the drafts inside
6 Visualex, and then multiple exchanges of the drafts with the
7 client, and the backup consultant, who is often the one working
8 at midnight and 3 in the morning with the trial teams, is the
9 one communicating back and forth between them, communicating
10 back and forth between the lawyers -- should I stop, your
11 Honor?

12 THE COURT: I have a little emergency. I have to take
13 a phone call. Be right back.

14 (Recess)

15 MR. RISK: We were speaking about the creative
16 professional exemption, your Honor. They have artists. And
17 she is plainly not one of them. That's what I want to say
18 about that.

19 Quickly, the administrative exemption. Ms. Kadden is
20 not an administrator. Her job description in her offer letter
21 make it quite clear that she is hired to render services for
22 clients. At Visualex her hours are the service rendered. It's
23 like a law firm. They record time, and your Honor will see the
24 time sheets, and then they send bills to clients. On the
25 production administration dichotomy --

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1 THE COURT: Why does anybody think there is fault
2 under the administrative exemption. You do think so,
3 Ms. Klein?

4 MS. KLEIN: Yes, I absolutely do.

5 THE COURT: Why?

6 MS. KLEIN: I absolutely do.

7 THE COURT: Why.

8 MS. KLEIN: For the reasons that we have previously
9 set forth. For several reasons. One is, she regularly
10 exercised discretion and judgment.

11 THE COURT: Every employee exercises discretion and
12 judgment, don't they, to some degree?

13 MS. KLEIN: To some degree you like to think everybody
14 works professionally, but that's understood differently under
15 the federal law. It has a very significant meaning, whether or
16 not she was exercising discretion and judgment of matters of
17 significance to either her employer or the employer's
18 customers. You will see here, again, that as a consultant,
19 which the Department of Labor itself recognizes as an MD
20 administrative exemption, that this is exactly the type of
21 case. She was making recommendations. She was making
22 decisions consistently. This is not the type of job that has
23 ever, ever historically or currently been recognized as one by
24 the Federal Government as one that is a nonexempt position.

25 THE COURT: I'm really not grasping the administrative

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Opening - Mr. Risk

1 exemption. In a recent Ninth Circuit case, the circuit said an
2 administrative employee participates in the running of the
3 business and not merely the day-to-day carrying out of its
4 affairs. It's hard to understand that she was running the
5 business, hardly.

6 MS. KLEIN: And servicing the business' clients.

7 THE COURT: That's what I'm trying to say. You're
8 losing me on that exemption. Everybody services a client.
9 Let's say you are a law firm, which you are. Everybody, from
10 the receptionist, to the secretaries, to the paralegals, to the
11 lawyers, are servicing the client. That's the purpose of the
12 law firm, is to service the client. I'm not understanding that
13 exemption. I understand the creative one. I understand the
14 learned one. You're really losing the administrative one.
15 You're sort of saying, everybody who is in client services is
16 an administrator.

17 MS. KLEIN: No, your Honor, I'm not at all saying
18 that.

19 THE COURT: I'm not getting it. You have to convince
20 one person today.

21 MS. KLEIN: That's right. And, again, I believe, not
22 to cut off Mr. Risk's opening --

23 THE COURT: I'm asking you. It's informal. I'm
24 asking you.

25 MS. KLEIN: Again, I am absolutely confident that

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Opening - Mr. Risk

1 under the regulations they specifically say that a consultant,
2 which is doing the type of work -- this isn't the dichotomy
3 that Mr. Risk says is a production line. The production line
4 is the artists who are making the demonstrative exhibit that
5 ends up in the courtroom.

6 When she was doing her job, Ms. Kadden, as well as the
7 other consultant, is looking at something, after interviewing
8 and analyzing extensively complicated patent information,
9 medical backgrounds, expert reports. She is making a
10 recommendation. She admits at her deposition about visually,
11 does this work, does it further my client, the law firm's
12 story? What it is that they are trying to sell so they can
13 benefit their clients. This is exactly what the statute was
14 written to cover of this type of administrative exemption. She
15 exercised on a daily basis, if she was doing her job,
16 discretion and judgment of matters of significance.

17 THE COURT: This is the closest call to me. This is
18 the most worrisome one. I don't get this one terribly well.
19 Your adversary is utterly convinced, her passion is convincing,
20 but I don't truly understand the law part of it.

21 MR. RISK: We are convinced, too, your Honor. Here is
22 why.

23 THE COURT: She does exercise judgment, doesn't she?

24 MR. RISK: She does.

25 THE COURT: She exercises independent judgment. She

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Opening - Mr. Risk

1 exercises discretion, right?

2 MR. RISK: We don't think so, your Honor.

3 THE COURT: Somebody has to decide whether this
4 graphic is communicating what the lawyers want. You said she
5 is not the artist. She is the one who is back and forth
6 between the lawyers and the artists to try to get the concept.
7 So the lawyers explain it to her, then she tells the artist,
8 then she gets a draft, reviews it with the lawyers, go back and
9 forth.

10 MR. RISK: Your Honor, when your Honor sees the
11 graphics and hears the testimony, we think you'll conclude that
12 her role was extremely limited.

13 But that takes us away from the administrative
14 exemption because that is hard. It's for people who administer
15 the organization.

16 THE COURT: You say that. Your adversary doesn't say
17 that at all.

18 MR. RISK: I know.

19 THE COURT: She said, look at the regulation, which is
20 one thing I don't have in front of me, is the regulation.

21 MR. RISK: I know she does, your Honor.

22 THE COURT: You want to hand it up. You said the
23 regulation.

24 MS. KLEIN: Yes. I'm happy to provide it.
25 Unfortunately, I have handwritten notes, if you don't mind.

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Opening - Mr. Risk

1 THE COURT: If you have a clean copy of the
2 regulations.

3 MS. KLEIN: They are also cited in the briefs, the
4 specific sections.

5 THE COURT: I didn't bring the briefs.

6 MS. KLEIN: We will get it for you.

7 THE COURT: Because I realize that she is not managing
8 the company. She is not carrying out the affairs of the
9 company. If that's critical to this exemption, then there is
10 no way she fits in it, period.

11 MS. KLEIN: The regulation says under the
12 administrative exemption under 29 CFR 541.200(22)(c) -- I'll
13 read it. To be exempt as a bona fide administrative employee
14 under 29 CFR 541200, all of the following tests must be met.

15 THE COURT: All of the following tests?

16 MS. KLEIN: Right.

17 THE COURT: Is there one about running the company?

18 MS. KLEIN: The three parts. May I read them? The
19 employee must be compensated on a salary basis, salary or fee
20 basis as defined in the regulations at a rate of not less than
21 \$455 a week and then a part --

22 THE COURT: She meets that one.

23 MS. KLEIN: I think we do not dispute that.

24 MR. RISK: I dispute that Ms. Klein is reading from
25 the regulations. I think that's the field operations manual.

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1 I have the regulations.

2 THE COURT: You can read from it.

3 MR. RISK: I have one copy, your Honor.

4 THE COURT: That's why I said, you can read from it,
5 if you read slowly.

6 MR. RISK: Section 541.200. The term employee
7 employed in a bona fide administrative capacity shall mean any
8 employee: Part 2, whose primary duty is the performance of
9 office or nonmanual work directly related to the management or
10 general business operations of an employer or the employer's
11 customers; and, part 3, whose primary duty involves the
12 exercise of discretion and independent judgment.

13 THE COURT: I think part 3 I'm not worried about.

14 MR. RISK: If I may continue. 541.201: To qualify
15 for the administrative exemption, an employee's primary duty
16 must be the performance of work directly related to the
17 management and general business operations of the employer or
18 the employer's customers. The phrase directly related to the
19 management or general business operations refers to the type of
20 work performed by the employee. To meet this requirement, an
21 employee must perform work directly related to assisting with
22 the running or servicing of the business as distinguished, for
23 example, from working on a manufacturing and production line or
24 selling a product in retail or service establishment.

25 B. Work directly related to management or general

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1 business operations includes but is not limited to work in
2 functional areas, such as tax, finance, accounting, budgeting,
3 auditing, assurance, quality control, purchasing, procurement,
4 advertising, marketing, research, safety and health, personnel
5 management, human resources, employee benefits, labor
6 relations, public relations, government relations, computer
7 network, Internet and database administration, legal and
8 regulatory compliance, and similar activities. Some of these
9 activities may be performed by employees who also would qualify
10 for another exemption.

11 C. An employee may qualify for the administrative
12 exemption if the employee's primary duty is the performance of
13 work directly related to the management or general business
14 operations of the employer's customers, which Ms. Klein pointed
15 out; thus, for example, employees acting as advisors or
16 consultants to their employer's clients or customers as tax
17 experts or financial consultants, for example, may be exempt.

18 Ms. Kadden and her colleagues that are consultants at
19 Visualex did the work that Visualex makes its living from.

20 THE COURT: She didn't, though. She didn't do the
21 drawing. She is not the graphic artist.

22 MR. RISK: But her time was billed by the hour --

23 THE COURT: I know.

24 MR. RISK: She did not have an administrative job
25 inside Visualex.

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1 THE COURT: I don't know about that. She was the
2 consultant, right, on the graphic design. She interfaced
3 between the lawyers and the artist.

4 MR. RISK: Yes.

5 THE COURT: Just like a tax consultant.

6 MR. RISK: Well, the regulations contemplate that when
7 an employee renders services for a customer in its internal
8 administration, that might qualify for the administrative
9 exemption. Here, the clients are law firms, the law firms have
10 clients. The Visualex bill presumably ultimately finds its way
11 to the law firm's clients. She is the product or service. Her
12 time, her hours add product or service rendered by Visualex.
13 She had some small administrative responsibilities inside
14 Visualex, but it's clear she is hired to do billable work.

15 THE COURT: I don't know that doing billable work
16 exempts you from being classified for the administrative
17 exemption because a tax consultant also bills by the hour. So
18 the fact that people bill by the hour doesn't disqualify them
19 from that exemption, from what I'm listening to.

20 MR. RISK: That's right, your Honor. I think if a
21 consulting firm rendered tax advice to a client, that tax
22 advice is part of the internal administration of the client.
23 Here, the law firm is hiring Visualex, as this gentleman may be
24 hired here today, to render services in connection with its
25 provision of services to its own clients. That's why it's

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1 nonadministrative.

2 THE COURT: You might as well finally continue past
3 the three exemptions.

4 MR. RISK: Well, I think I'll stop there, your Honor.
5 We have briefed -- there is a somewhat complicated legal issue
6 raised by Visualex, which is, if Ms. Kadden is entitled to
7 overtime, it should be computed on the half time method, and I
8 think your Honor may have read a little bit about that in the
9 drafts addressed in the motion in limine. As we have said in
10 the papers, the halftime method has never been used in the
11 Second Circuit. It's been rejected a bunch of times. To say
12 it in plain English, your Honor, it takes the guts of the
13 remedy out of what is a remedial statute.

14 THE COURT: Why do you think the halftime methodology
15 applies then, Ms. Klein, if it's been repeatedly rejected in
16 the Second Circuit?

17 MS. KLEIN: It has never been rejected from the Second
18 Circuit.

19 THE COURT: Why did he say that?

20 MR. RISK: In Second Circuit courts.

21 THE COURT: Not the circuit court. He means in
22 district courts in this circuit.

23 MS. KLEIN: As well as courts have endorsed it, as
24 well as the Department of Labor endorses it as the proper way.
25 And I would also note --

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1 THE COURT: Now you are both saying the Second Circuit
2 has not yet ruled.

3 MS. KLEIN: I have never addressed it. It has never
4 been put in front of it. The majority of the circuits have
5 adopted, as well as the Department of Labor, which is the
6 agency in charge with enforcing it.

7 I would also put out there, your Honor, while it's not
8 a direct, in a sense, explicit ruling per se I'm adopting,
9 because I don't want to mislead anything, but your Honor
10 yourself in 2009 in a case called continuing Ting Yao Lin v.
11 Hayashi, it was a case which Magistrate Judge Peck had the
12 issue in front of him on an FLSA case and the calculation there
13 that was endorsed and adopted by your Honor was a halftime
14 rate.

15 THE COURT: For all I know, there was not even an
16 objection.

17 MS. KLEIN: Of course, but I am sure.

18 THE COURT: In other words, if he did a report and
19 recommendation and there was no objection, of course I adopted
20 it. It doesn't mean I gave it any thought. I'm saying it's
21 Judge Peck's opinion. If there was no objection, that's it.

22 MR. RISK: Were the Second Circuit or were your Honor
23 to decide there might be a case that is appropriate for
24 application of the halftime method, it wouldn't be this case.

25 The case law on halftime method suggests it begins

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Opening - Mr. Risk

1 with an understanding between the employer and an employee.

2 There was an understanding between Visualex and Ms. Kadden set
3 forth in a signed offer letter, dated May of 2008, and it said
4 explicitly -- that's going to be Exhibit 3 -- explicitly you'll
5 be paid time and a half, overtime, time and a half after 40
6 hours. The pay stubs, which we will introduce as Exhibit 5,
7 indicate during that period regular rate, \$36; overtime rate,
8 \$54. So the documentary trail shows that the time and a half
9 method was used.

10 It's true that in March of 2009, Visualex told Ms.
11 Kadden that it wasn't going to pay any more overtime. And I
12 suppose, I suppose there was an understanding in the loosest
13 sense, to the extent that when the employer says I'm not paying
14 that anymore, she heard what they said. It would be a poor
15 case for application of the halftime method. I am going to
16 stop there, your Honor.

17 THE COURT: I would like you to address the last
18 point, which is liquidated damages.

19 Is she entitled to liquidated damages?

20 MR. RISK: Yes.

21 THE COURT: That's the last one.

22 MR. RISK: Your Honor addressed that, as your Honor
23 may recall, in the motion in limine, and there is some history
24 that goes with that.

25 Your Honor can give us some guidance on how the Court

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1 would like us to proceed here. The deposition testimony from
2 Ms. Romano says, I've been around the industry and I didn't
3 think consultants -- what she said was, I thought they are
4 salaried. I knew that and I did a Google search and it took me
5 to the Department of Labor. I don't remember it so well now,
6 but I concluded that I didn't have to pay the overtime.

7 And then there is the issue about advice of counsel.
8 We were here in March and your Honor ruled not to disclose the
9 documents and now it's been revisited. I don't know if your
10 Honor wants -- the documents have not been disclosed. I don't
11 know how your Honor wants to proceed.

12 THE COURT: Depends if they rely on the advice of
13 counsel. I said if they do that at trial, they have to
14 disclose that.

15 MR. RISK: Our position is that we are entitled to
16 liquidated damages. We are a little in the dark. We don't
17 think that the testimony that we have heard so far is
18 unequivocal enough as to what was done. We don't know what
19 happened or whether they will rely on advice of counsel, and we
20 remind the Court, we think in view of all of the facts of this
21 case and the way the overtime was withdrawn, we would hope the
22 Court would exercise its discretion to award the liquidated
23 damages, even upon a finding of good faith and reasonable
24 basis, which discretion the Court has. The statute reads, your
25 Honor, that in the event the finding of good faith and

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Opening - Mr. Risk

1 reasonable basis is made, the Court has discretion to award
2 liquidated damages in no amount or in any amount up to 100
3 percent.

4 THE COURT: Is there some issue about an offset?

5 MS. KLEIN: Yes.

6 MR. RISK: Yes.

7 THE COURT: What's that last issue about an offset?

8 MS. KLEIN: Your Honor, before we move on, may I
9 address one thing, because I want to know how the Court would
10 like us to proceed.

11 In the decision in the motion in limine and I believe
12 at the earlier, one of the conferences that we had, I
13 understood that we were not going to get to the issue of the
14 good faith, the attorney-client until you made a decision as to
15 whether or not the position was exempt. You had suggested that
16 it would be an informally sort of bifurcated, let's see whether
17 or not the position falls within an exemption. And if it does
18 not, that we would then be faced with the situation, if we want
19 to put on the evidence about good faith --

20 THE COURT: But half an hour ago Mr. Risk asked if we
21 were bifurcating. I didn't want to formally bifurcate. We
22 have to recall witnesses. But if you want me to rule orally
23 and quickly at some point about these exemptions -- otherwise,
24 I would have to take a break for two weeks and write a learned
25 opinion, call you back and do damages. I don't want to go

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Opening - Mr. Risk

1 through all that. If you want some quick read on these
2 exemptions, I'll give it to you before you make that decision.
3 But I don't want to recall witnesses. They are going to have
4 to testify pretty much about everything anyway, so it's tricky.

5 MS. KLEIN: Your Honor, may I ask something. This is
6 sort of food for thought. We are scheduled to be here --

7 THE COURT: Three days.

8 MS. KLEIN: Exactly, until Wednesday. And two primary
9 witnesses are going to be here the whole time. Depending, I
10 guess, on how fast we can move along today and tomorrow, if it
11 was just on the issue about the work that was actually done, I
12 would not be opposed, I don't know if Mr. Risk is, I don't want
13 to unnecessarily waste the Court's time with the offset. The
14 back pay is tedious going through week by weeks of descriptions
15 of work which we may never have to get to.

16 THE COURT: What's the offset issue?

17 MS. KLEIN: The offset issue involves essentially the
18 fact that not only the base salary, let's put that aside, that
19 she was paid significantly more than any of the nonexempts, but
20 even as having her base salary of 75,000, there were many
21 things that she received because of the understanding that she
22 was exempt, which was, for example, comp days, paid time off,
23 other things that she would not otherwise have gotten.

24 There was also improper characterizations in her time
25 sheet where she characterized things. For example, as, you

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1 know, a sick day, but it was having her car fixed.

2 Unfortunately, as a result of this litigation we have gone
3 through them. And when she ultimately left the company, she
4 was given, what was the company's policy. If you have accrued
5 unused vacation, you were given a check to represent that
6 amount. But having now had an opportunity --

7 THE COURT: Is that true for exempts and nonexempts?
8 They both get the vacation pay?

9 MS. KLEIN: Yes. Any accrued unused time --

10 THE COURT: Both of them get that.

11 MS. KLEIN: Yeah. But the issue is, she was overpaid.
12 She was paid vacation which was not truly vacation. She was
13 fully responsible, Ms. Kadden, in inputting her own time,
14 characterizing it as whatever she wanted, consulting, quality
15 control client revisions. She characterized her time. And
16 basically the way a small company works, I'm sure your Honor is
17 familiar, is, it's somewhat of good faith and they push a
18 button and it calculates and it said she has vacation. She was
19 handed a check for 54 hours of vacation or approximately.

20 In fact, she wasn't entitled to it because she had not
21 been putting in her time correctly. She was calling it sick,
22 which gave her more vacation left in a pot, when in fact she
23 didn't have it.

24 Our only point on the offset, and I'm hoping we don't
25 have to get there, if the Court is going to decide that she is

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1 nonexempt, which we don't agree with, if it does, that equity
2 and fairness would mean that everybody be put --

3 THE COURT: How much money are we talking about on the
4 offset issue?

5 MS. KLEIN: Around \$4,000, I believe. The whole
6 amount isn't that much. If we apply the halftime method --

7 THE COURT: I suggested at the outset that we all get
8 our three days back and settle the case. You apparently are
9 not interested.

10 MS. KLEIN: Can I share with you why we can't do it,
11 if you have any desire to know? This is only about Ms. Kadden.
12 This is an entire industry that qualifies, graphic consultant
13 as exempt. We have other employees. This is not a sole
14 plaintiff. It's much bigger than that.

15 How can Visualex function as a business, not knowing?
16 It's following what it believes the Department of Labor said.
17 How can it function and live and go forward when there is this
18 hanging over them? If they pay her, it's an unanswered
19 question. And we have all these other people that are behind
20 us. We have New York statutes of limitations. There is a lot
21 more at stake. You know what, even if you rule that she is
22 nonexempt, better to know but the Department of Labor says one
23 thing and if this Court believes differently, you know what,
24 the business owners can't function if they don't know. So,
25 unfortunately, it's not the number. It's just not.

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1 THE COURT: What are you saying that the Department of
2 Labor says?

3 MS. KLEIN: That consultants are exempt employees.

4 THE COURT: Consultants, no matter what kind of
5 consultant, no matter what kind of business, all consultants?

6 MS. KLEIN: Of course it uses that as the example and
7 then it sets forth in the regs the examples and you have to
8 meet the test, the primary duty matters of significance.

9 THE COURT: Which exemption is that?

10 MS. KLEIN: The administrative. We are not sticking
11 on a label. We are not saying that she was -- she doesn't
12 disagree that she was a consultant. It would be one thing if I
13 called you a consultant, but I really had you acting as a
14 janitor. Titles don't mean anything in that way. We don't
15 dispute the work she was doing, nor did she. She admitted at
16 her deposition all of the matters of significance.

17 MR. RISK: There are a number of things to address,
18 your Honor. Titles don't mean anything under the FLSA. Duties
19 do.

20 THE COURT: Your adversary agrees with that.

21 MR. RISK: We are going to put on a case about that.
22 To say that consultants are exempt or nonexempt is not really
23 the language --

24 THE COURT: Your adversary agrees. It depends on the
25 job duties. But generally, nonetheless, the Department of

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Opening - Mr. Risk

1 Labor seems to say consultants then defined.

2 MS. KLEIN: It says acting as an advisor or
3 consultant.

4 MR. RISK: If an employee gives advice on the
5 administrative functions of a customer, that might be the same
6 as administering in the home company.

7 THE COURT: We talked about that because I told you
8 that's the most difficult one for me apparently, really just
9 became confirmed in this last minute or so of colloquy. This
10 is the one that's confusing, you said, because the Department
11 of Labor uses the word consultant as exempt, depending on the
12 duties. This is the trickiest of the three, I think.

13 MS. KLEIN: Also, one of the things that may help
14 hopefully crystallize it for everyone is, think about it. A
15 law firm, what do we do? Our business, right, is hopefully
16 winning cases for our client, whichever side that may be. If I
17 am acting as a consultant in advising Skadden Arps, whatever
18 law firm, on how to do a better job so that they will have a
19 better result for their client, I am rendering advice to them
20 on how to do it better. That is exactly, again, what the
21 Department of Labor has addressed. This isn't unique. It's
22 not something unusual.

23 MR. RISK: It's not what the Department of Labor has
24 addressed at all. If someone were advising Skadden Arps on its
25 matching information systems --

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1 THE COURT: That's running the business. I see that
2 one. That's running the business of Skadden Arps, sure.

3 MR. RISK: That's where the administrative exemption
4 goes.

5 I would like to speak on this offset issue because
6 there is no issue, and we have briefed it very carefully. This
7 is not the first employer in the history of the FLSA to come in
8 and say, even if we owe overtime, we paid some other money, the
9 statute and the regs are clear about what can be offset. I
10 don't think there is -- I didn't hear from Ms. Klein nor seen
11 in the papers any statutory basis for this claim of offset.

12 The time sheets that we are hearing about are
13 Visualex's time records. Ms. Kadden entered time which was
14 reviewed by Visualex and its bills were sent to clients based
15 on that. The idea that we are going to put Ms. Kadden on the
16 stand and ask her what she did on a Thursday three years ago,
17 it's not right and there is no authority for it. Even in
18 courts that have allowed an offset where the payment is a
19 premium pay payment, often that's limited to a premium payment
20 during the same pay period that the claim of overtime is for.
21 There is no legal basis for that at all.

22 More importantly, your Honor, in connection with the
23 submission of the pretrial order, we went back and forth with
24 defendant's counsel and I think we reached an agreement, and it
25 involved me modifying my calculation of the numbers. I thought

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1 we reached an agreement, which I have set forth in an e-mail,
2 that the productive working hours at issue here are 416.7
3 hours, and I thought that's the one fact that we resolved.

4 THE COURT: Have we resolved it?

5 MS. KLEIN: Your Honor, what the documents show and
6 what we have agreed is that plaintiff is claiming there are 416
7 hours of overtime that based on looking at those time sheets
8 and you add them up and you are correct, we worked on some that
9 clearly were not and should not have been in there, we have
10 reached the number of 416.

11 In regards to the issue of the premium pay and things
12 of that sort, if I can just address one other thing, not to
13 make this so legalese at this point, the Department of Labor as
14 well as numerous circuit courts have also addressed and adopted
15 not only the halftime method, but also the prepayment method,
16 which says that if you take somebody that is improperly
17 classified and they were being paid as an exempt employee along
18 the way, every paycheck, 1500, 1500, there is no deductions or
19 anything like that, and it's then determined that it wasn't
20 correct, the extra money and the things that they received are
21 allowed to basically be considered prepayment going towards the
22 overtime. This isn't supposed to be a windfall. If we are
23 saying that Ms. Kadden was hourly, as she is claiming, then,
24 again, she should have been treated that way. This is not
25 meant to be anything more than making sure she got the wages

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1 she was supposed to get. She can't take from here.

2 THE COURT: She can't have it both ways. I
3 understand.

4 MS. KLEIN: That's right. That's all we are saying.

5 THE COURT: She is entitled to overtime.

6 MS. KLEIN: One or the other.

7 THE COURT: Then she wasn't entitled.

8 MS. KLEIN: To the benefit of being an exempt. You
9 get to come in at 11:00, you get paid the same salary because
10 there is no deduction, or you leave, as she writes in her
11 notes, on her calendar, it's a gorgeous day, leaves at 1:30,
12 that's nice, but that comes with being a professional because
13 you know you could get your work done.

14 MR. RISK: What I don't think there is a basis for,
15 and I hope we are not going to spend thousands of dollars in
16 professional time and this Court's time going over Ms. Kadden's
17 recollection of time sheets that were submitted to and accepted
18 by Visualex three years ago, because she will have no
19 recollection of what she did on a Thursday three years ago.

20 Not to talk about settlement, but Ms. Klein did, the
21 problem -- I don't really understand why a typical nonadmission
22 settlement agreement would create a problem for Visualex. I
23 would think it would help them. But, your Honor, the problem
24 at this stage, as your Honor has alluded to, is it's a modest
25 claim, but it's under the federal statute and we have spent a

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1 year now of professional time that we tried to head off last
2 fall. That's the problem. But we are here.

3 MS. KLEIN: Your Honor, may I say one other thing. We
4 are talking sort of mixing between openings and facts and law
5 and stuff.

6 While Mr. Risk says this is a modest dollar amount.

7 THE COURT: It is. But you said it's bigger than
8 that.

9 MS. KLEIN: That's right. What I think that this case
10 has boiled down to, and I think the parties -- Mr. Risk
11 admitted it the first time we were in front of your Honor, this
12 part of it isn't in dispute. Ms. Kadden was hired. Visualex
13 had at that time the ability to give incentive compensation in
14 the form of overtime to its professional staff. You'll hear
15 the reasons why they did that, for a good reason, to treat
16 employees a certain way. She was an hourly employee. She
17 didn't have an employment contract. There came a point in time
18 in 2009 where it couldn't be.

19 Either everyone was going to be laid off or nobody
20 would have food to put on the table for their families and
21 money coming in, or they were able to make a decision. They
22 were able to look to see where are we spending money that we
23 either don't need to or we can't afford to right now, but
24 legally still within the realm of legality.

25 Hourly employees were never changed. They still

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1 receive overtime to this day. I understand, if Ms. Kadden is
2 disappointed she accepted a job and somewhere along the way it
3 changed, I get that. The alternative was laying her off. And
4 when it was announced that at this point we can no longer pay
5 the professionals this, and this will be your salary going
6 forward, if things get better, we are the first ones, Visualex,
7 that want to, if we can do it, we want to share the wealth.
8 But we are tightening our belts and therefore you have to. And
9 when she stays and continues to work there, it changes.

10 Again, it's no different than -- I know many lawyers
11 and many professionals that in the difficult times of 2009,
12 2010 took rollbacks in their salary. That happens. And this
13 is not, although I think it was meant to be started as, a
14 breach of contract claim. And that's what this case comes down
15 to. Ms. Kadden didn't receive overtime. She considered
16 herself exempt when she did the exact same job at Doar. Why
17 are we here? It's because there was a change. I agree it
18 might have been -- yeah, it stinks, I get that.

19 MR. RISK: Well, your Honor, I am not sure what kind
20 of argument that is.

21 THE COURT: I understood what it is.

22 MR. RISK: It needs a response.

23 THE COURT: Oh, really.

24 MR. RISK: She didn't do the exact same job at Doar.
25 We are just asking the Court to apply the law.

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1 Back to that firehouse I was telling your Honor about,
2 where they sit often idly and then work late at night serving
3 trial teams at trial. After 6:00, Visualex increases by 50
4 percent the consultant's hourly rate. Ms. Kadden's hourly rate
5 was 225. I think that makes it 337.50. This is a job where
6 midnight is quite common. If it's a trial, midnight night
7 after night, 3 in the morning. Whether Visualex is rich or
8 poor, I don't know. I know they do big matters for some of the
9 best-known law firms in the world. I hear them claiming
10 poverty. I don't know.

11 We are here asking the Court to apply the law and
12 recognize that the hours at issue here, Visualex is making a
13 lot of money on Ms. Kadden's time. And she was paid \$54 an
14 hour and that's what we are seeking for the hours.

15 THE COURT: Ms. Klein.

16 MS. KLEIN: Your Honor, may I just, before we start
17 the direct, can we take a two-minute break and start with our
18 first witness. Is that okay?

19 THE COURT: Sure.

20 (Recess)

21 MS. KLEIN: Your Honor, just as a housekeeping matter,
22 we had delivered down to the Court all of the exhibits. You
23 are like, what do I need them for?

24 THE COURT: No. I don't know where we put them.

25 MS. KLEIN: We have two big binders that were

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1 delivered to the Court.

2 THE COURT: When?

3 MS. KLEIN: Friday. They are around this big.

4 THE COURT: Whatever. Two big binders. We will look
5 around. We would have brought them down if we found them, but
6 I am sure -- not sure. They may have arrived after the
7 mailroom made its last delivery, which means it would not have
8 been made until the morning delivery and the morning delivery
9 is around 11:30.

10 MR. RISK: I have two books to hand you. Should I do
11 that now or later?

12 THE COURT: Later. Those are your books.

13 They came on Friday?

14 MS. KLEIN: They were hand-delivered around 2:00.

15 THE COURT: You think they were hand-delivered at
16 2:00, two binders?

17 MS. KLEIN: On Friday.

18 Your Honor, while that's going on, if I can just share
19 something with you. So some of the exhibits, as you can see
20 from the amount of paper that are on our tables, are very
21 extensive. I will not be using all of them.

22 So what I have done, to just try to make this go
23 faster for everyone, is the exhibits that are the ones that are
24 hundreds and hundreds of pages I have selected out the pages
25 that we are using and bound them, just to make it easier for

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1 everyone. They are part of this. And if that's okay with
2 everyone, I made a copy for everyone.

3 THE COURT: That's fine.

4 MS. KLEIN: That I think will make this go faster.

5 THE COURT: Okay.

6 MS. KLEIN: We will find out where specifically it was
7 left. We are going to call our mailroom, who brought it down.
8 I have extra copies as we go through.

9 THE COURT: Who is the first witness?

10 MS. KLEIN: You are ready, your Honor?

11 THE COURT: Yes.

12 MS. KLEIN: At this time I would like to call Lillian
13 Romano to the stand, your Honor.

14 LILLIAN ROMANO,

15 called as a witness by the Defendant,

16 having been duly sworn, testified as follows:

17 MS. KLEIN: Your Honor, may I just ask, since we are
18 not in front of a jury, how you want to run things. We have
19 the exhibits. When I am going to offer them, if we can show
20 them on the projector, if that's okay with you so we are all
21 looking at the same thing.

22 THE COURT: Sure. I don't have the exhibit set yet.

23 MS. KLEIN: I do. And I have extra copies of most.
24 If not, we will have that and I can replace them.

25 THE COURT: I hope we get them in the next half hour.

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1 DIRECT EXAMINATION

2 BY MS. KLEIN:

3 Q. Good morning, Ms. Romano.

4 A. Yes.

5 Q. Are you currently employed?

6 A. Yes.

7 Q. Can you tell me where you're currently employed?

8 A. Visualex LLC.

9 Q. What is your profession?

10 A. I'm a graphics consultant.

11 Q. How long have you worked as a litigation graphics
12 consultant?

13 A. A little over 20 years.

14 Q. Can you briefly tell us your professional background?

15 A. I started as a graphics consultant at Litigation Sciences
16 back in 1990. I was there for about five years. And then I
17 took a position as a graphics consultant at Pixel. I was there
18 for about ten months. And then I went to FTI Consulting, and I
19 was a graphics consultant there until end of 1999, at which
20 point I started Visualex.

21 Q. As a result of your professional background that you just
22 testified, are you familiar with the industry?

23 A. Yes, very.

24 Q. In your years of experience in the industry, are litigation
25 graphic consultants known by any other titles?

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Romano - direct

1 A. A lot of different companies give different titles. They
2 all mean the same thing. It could be a trial graphics
3 consultant, a communication consultant, a trial consultant.
4 There is a lot of different nomenclature, but it all means the
5 same thing.

6 Q. Have you personally ever held the title trial graphic
7 consultant?

8 A. That's the function I perform, but I have always called it
9 graphics consultant.

10 Q. And can you explain to the Court -- let me ask you. You
11 said that you started Visualex. That's your company?

12 A. Yes.

13 Q. And are you the sole owner?

14 A. No. There are three owners.

15 Q. Can you tell us --

16 THE COURT: When did you start it?

17 THE WITNESS: The end of 1999.

18 THE COURT: Who are the other two owners.

19 THE WITNESS: Brian Fennessy is the creative director
20 and vice-president, and then we have just an investment
21 partner, which was actually my brother, Joseph Romano.

22 THE COURT: Thank you.

23 Q. Can you tell us, Ms. Romano, what is Visualex in its most
24 basic form?

25 A. In its most basic form we are a litigation support company.

C8DMKADT

Romano - direct

1 Q. Does Visualex specialize in anything in particular?

2 A. Yes. We specialize in providing visual presentations in
3 conjunction with litigation.

4 Q. And generally who are Visualex's clients?

5 A. Generally, it's the law firm, but there are times that we
6 actually work directly with the ultimate client. But generally
7 it's the law firm.

8 Q. Throughout the history of Visualex, just for purposes of
9 make it simpler, has the general format of the business
10 remained the same?

11 A. Yes.

12 Q. And what I would really like you to focus on is if there is
13 a difference between the time when Ms. Kadden was there to
14 today.

15 What are the different job titles at Visualex during
16 the time in question?

17 A. Consultants, art directors, designers, production
18 coordinator, director of motion graphics, and bookkeeper.

19 Q. And what is the primary job of the consultants?

20 A. The primary job of the consultants is to review and analyze
21 case materials and to create and develop the most effective
22 visual strategy to help the trial teams communicate their case
23 to the trier of fact.

24 Q. And in your experience did graphic consultants have any
25 specialized areas of education?

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Romano - direct

1 A. Yes.

2 Q. And what are they?

3 A. A postgraduate degree, social sciences, or a JD. Any
4 postgraduate degree, really.

5 Q. When you say JD, just for the record, can you tell us what
6 you are referring to?

7 A. They are a lawyer.

8 Q. In 2008, were you aware of any individuals that worked in
9 your profession as a graphics consultant that did not have an
10 advanced educational degree?

11 A. No.

12 Q. In your opinion, if you can just explain for us, what is
13 the interplay or the relevance between these various areas of
14 the law, whether it's the psychology and the relevance of the
15 background?

16 MR. RISK: Object to the form of the question.

17 THE COURT: It's compound. Is that what you object
18 to?

19 MR. RISK: Compound, vague, confusing.

20 THE COURT: I don't know about any vague or confusing,
21 but it's certainly compound.

22 Q. In your opinion, what is the interplay between psychology
23 of the law and the job of graphic consultant?

24 A. The law aspect of it, obviously, if you are familiar with
25 the legal industry and you kind of know how it works, that's

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Romano - direct

1 always an advantage. You are going to be dealing with lawyers.
2 Obviously, if you have some knowledge of how the legal industry
3 works, that's very helpful. From the psychology side of it,
4 because what you are trying to do is to craft a presentation
5 that most effectively communicates very complex concepts, what
6 you have to understand and be aware of is human learning
7 theory, how people assimilate information. That's how you know
8 different ways that would make the visual presentation more
9 impactful.

10 Q. Do you have an advanced degree?

11 A. Yes.

12 Q. In what?

13 A. Applied research and evaluation, psychology.

14 Q. In the time when you started in the industry, had you
15 already had an advanced degree?

16 A. Yes.

17 Q. You mentioned before that your first job as a graphic
18 consultant, if I remember correctly, was Litigation Sciences,
19 Inc.?

20 A. Correct.

21 Q. Is that also referred to as anything else?

22 A. Yes. It's LSI.

23 Q. So LSI and Litigation Science is one in the same?

24 A. Right.

25 Q. Would you have been hired by LSI if you did not have an

C8DMKADT

Romano - direct

1 advanced degree?

2 A. No.

3 Q. Why is that?

4 A. It was required.

5 Q. Do you know of anyone at LSI that worked as a graphic
6 consultant that did not have an advanced degree?

7 A. Not that I'm aware of, no.

8 Q. What was your primary duty as a graphic consultant at LSI?

9 A. It's the same as what it is, as I sit here today, as a
10 graphic consultant for Visualex. It is to review case
11 materials, analyze them, and come up with the most effective
12 visual strategy to advance the client's case and obviously help
13 them to get a win for their client.

14 Q. Were graphics consultants considered exempt employees at
15 LSI?

16 A. Yes.

17 Q. Do graphic consultants receive overtime at LSI?

18 A. No.

19 Q. After you left LSI, you joined a company called Pixel, is
20 that correct?

21 A. Yes.

22 Q. Are you aware of anyone at Pixel that worked as a
23 litigation graphic consultant that did not have an advanced
24 degree?

25 A. No.

C8DMKADT

Romano - direct

1 Q. What was your primary duty as a graphic consultant at
2 Pixel?

3 A. Consultant, as a consultant. It's the same as it always
4 was. It was to review the case materials and to develop the
5 most strategic visual presentation for clients.

6 Q. And were graphic consultants considered exempt employees at
7 Pixel?

8 A. Yes.

9 Q. Did graphic consultants receive overtime at Pixel?

10 A. No.

11 Q. After you left Pixel you said you joined FTI?

12 A. Correct.

13 Q. Would you have been hired by FTI if you did not have an
14 advanced degree?

15 A. No.

16 MR. RISK: Objection. Lack of foundation.

17 THE COURT: Well, right, if you didn't make that
18 objection when the same question was asked as to LSI, I
19 wondered if you would. Because she is saying would you have
20 been hired. You could ask it differently. Were all the
21 graphic consultants there, did all of them have advanced
22 degrees?

23 THE WITNESS: Yes.

24 THE COURT: Did any of them get overtime?

25 THE WITNESS: Yes.

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Romano - direct

1 THE COURT: That you can ask.

2 MS. KLEIN: Thank you, your Honor.

3 Q. Again, not to be repetitive, just to make it clear for the
4 record, what was your primary duties and responsibility as a
5 graphic consultant at FTI?

6 A. Again, same responsibilities, to review the case materials
7 and to develop strategic visual presentations.

8 Q. Since Visualex has opened its doors, how many graphic
9 consultants have worked for the company?

10 A. Nine, including myself.

11 Q. Can you tell us who they are?

12 A. Yes. In addition to myself, there was Ted Gipstein; Chip,
13 we call him Chip, but his name was Theodore walker; Marilyn.
14 Wesel, Kim Nawyn, Nicole Matthiesen, Adina Kadden, David Mykel,
15 and Heather Moran.

16 Q. Did Mr. Gipstein have an advanced degree at the time that
17 Visualex hired him?

18 A. Yes.

19 Q. Do you know what his advanced degree was?

20 A. Yes. A JD.

21 MS. KLEIN: Your Honor, if I can have the witness or
22 if I can hand it up, have her look at what's been premarked as
23 Exhibit AA.

24 May I approach, your Honor?

25 MR. RISK: Your Honor, Exhibit AA was not included in

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Romano - direct

1 the joint pretrial order. I did get it a week ago. And I
2 won't object to this one.

3 MS. KLEIN: Can you see it, your Honor?

4 THE COURT: Sort of. What I can't see is probably not
5 important, like his address. I don't see his address.

6 MS. KLEIN: I have it. Would you like it?

7 THE COURT: All right.

8 Q. Ms. Romano, have you seen this document before?

9 A. Yes.

10 Q. And what is it, please?

11 A. It's the résumé of Ted Gipstein.

12 Q. Is this document part of Visualex's business records?

13 A. Yes.

14 Q. And was it maintained in the ordinary course of Visualex's
15 business?

16 THE COURT: I am never going to allow this in as a
17 business record. You don't even have to lay the foundation.
18 He is not objecting. That's the end of it. It's not a
19 business record. It's the man's résumé. He wrote it, I
20 assume. Mr. Gipstein wrote it, correct?

21 THE WITNESS: Yes.

22 THE COURT: The fact that it's maintained, remember
23 the business record exception made in the regular course of
24 business. It is not the regular course of her business to
25 write other people's résumés. Let's all be learned about the

C8DMKADT

Romano - direct

1 business record exemption.

2 MS. KLEIN: Your Honor, it was maintained in the
3 ordinary course.

4 THE COURT: It doesn't matter. It has to be made and
5 kept in the ordinary course. This could never be a business
6 record. You know that now, right. I'm glad I've been helpful.
7 Now you now about the business records exception.

8 MS. KLEIN: Yes, your Honor.

9 THE COURT: There is no objection. It's received.

10 (Defendant's Exhibit AA received in evidence)

11 Q. Does Exhibit AA reflect Mr. Gipstein's advanced degree?

12 A. Yes.

13 MS. KLEIN: Your Honor, you said it's already been
14 admitted.

15 THE COURT: Yes. From the moment he didn't object, AA
16 was received. Yes, the man went to law school. And graduated,
17 I assume. JD, there it is.

18 MS. KLEIN: Your Honor, I'd like to hand the witness
19 what has been premarked as Defendant's Exhibit CC.

20 THE COURT: Are you going to object to CC, Mr. Risk?

21 MR. RISK: No, your Honor.

22 THE COURT: CC is received.

23 (Defendant's Exhibit CC received in evidence)

24 THE COURT: What's CC?

25 MS. KLEIN: It's Bates stamped VIS 2001 and VIS 2002.

C8DMKADT

Romano - direct

1 THE COURT: It's a letter from Mr. Gipstein to Ms.
2 Romano?

3 MS. KLEIN: Yes. It's a cover letter.

4 THE COURT: Why is it being offered? I know it's
5 received because there is no objection. Why are we getting it?

6 MS. KLEIN: Your Honor, it's relevant to showing the
7 interplay between law and the JD and the job of a graphic
8 consultant.

9 THE COURT: I don't think it's relevant to any of
10 that. It's his letter saying, hire me, I'm good. I quickly
11 understand legal issues and client objectives. Good. That's
12 his self promotion. That's fine.

13 Did you hire this guy?

14 THE WITNESS: Yes, I did.

15 THE COURT: When did he start, roughly?

16 THE WITNESS: In the early 2000s.

17 THE COURT: Is he still there?

18 THE WITNESS: No.

19 THE COURT: How long did he stay?

20 THE WITNESS: About three years. He had a stroke,
21 unfortunately.

22 MS. KLEIN: If we are not going to go over that --

23 THE COURT: We are not going over it. This letter is
24 not important. Go ahead.

25 MS. KLEIN: Your Honor, if I may, just for the record,

C8DMKADT

Romano - direct

1 say it is important for the purposes --

2 THE COURT: The ruling is, it's not important to me,
3 so we need to move on. I don't need reargument on each
4 rejected idea. I already took the exhibit. It's in the
5 record. I'm telling you, it's of no weight to me. I don't
6 care what he said about himself. I get it. He's a lawyer and
7 that's going to help him do his job. I get it.

8 MS. KLEIN: May I have Exhibit Y.

9 THE COURT: Do you object to Exhibit Y?

10 MR. RISK: Let me find it.

11 THE COURT: Take a minute, find it, tell me whether
12 you object.

13 MS. KLEIN: It's the résumé of Theodore Walker.

14 MR. RISK: No objection.

15 THE COURT: Y is received.

16 (Defendant's Exhibit Y received in evidence)

17 THE COURT: I see this person has a JD from Cardoza
18 law school in a year I can't read from here.

19 Q. Did Mr. Walker have an advanced degree --

20 THE COURT: You are going to have to stay with me.
21 I'm fast. He has got a JD from Cardoza law school in 1986.
22 You don't have to ask her if this person has an advanced
23 degree, because I just said it.

24 Did you end up hiring Walker?

25 THE WITNESS: Yes.

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Romano - direct

1 THE COURT: When did you hire him, roughly?

2 THE WITNESS: In 2005.

3 THE COURT: And how long did he stay?

4 THE WITNESS: He stayed for about a year.

5 THE COURT: Was he a graphics consultant?

6 THE WITNESS: Yes, he was.

7 MS. KLEIN: Your Honor, I'd like the witness to next
8 look at Exhibit Y.

9 THE COURT: This was Y?

10 MS. KLEIN: I'm sorry.

11 THE COURT: Y was received. It's in the record.

12 MS. KLEIN: Exhibit X.

13 THE COURT: Any objection to X?

14 MS. KLEIN: It's the résumé of Marilyn Wesel.

15 MR. RISK: No objection.

16 THE COURT: Marilyn Wesel's résumé, that one I can't
17 read on the screen.

18 This person also has a JD from the University of
19 Cincinnati College of Law 1993, right?

20 THE WITNESS: Yes.

21 THE COURT: And was a general counsel and a magistrate
22 in state court?

23 THE WITNESS: Yes.

24 THE COURT: You hired this person?

25 THE WITNESS: Yes, I did.

C8DMKADT

Romano - direct

1 THE COURT: Roughly when?

2 THE WITNESS: Roughly in -- I am not exactly sure. It
3 was after Chip left, so it must have been like 2006, around
4 there.

5 THE COURT: How long did this person stay, roughly?

6 THE WITNESS: About a year.

7 Q. Ms. Romano, Kim Nawyn also worked as a graphic consultant?

8 A. Yes.

9 Q. And did she have an advanced degree?

10 A. Yes.

11 Q. And do you recall as you sit here today what her advanced
12 degree was in?

13 A. Yes. In criminal justice.

14 Q. Do you know what degree she had?

15 A. Master's degree.

16 MS. KLEIN: Your Honor, I'd like to move to admit
17 Defendant's Exhibit W.

18 MR. RISK: No objection.

19 THE COURT: W is received.

20 (Defendant's Exhibit W received in evidence)

21 MS. KLEIN: Would you like a copy of it, your Honor?

22 THE COURT: Sure.

23 Q. And you hired Ms. Nawyn?

24 A. Yes, I did.

25 Q. And did you hire her in part because of her advanced

C8DMKADT

Romano - direct

1 degree?

2 A. Yes, I did.

3 Q. And was there any other relevant experience that she had
4 which made her a desirable candidate for Visualex?

5 A. Yes.

6 Q. And what is that?

7 A. She was a professor, which obviously was very helpful
8 because our job as consultant is to teach juries and judges
9 sometimes very complex information. So it's all about
10 teaching.

11 Q. Ms. Romano, Nicole Matthiesen, she was also a graphic
12 consultant?

13 A. Yes.

14 Q. And she had an advanced degree?

15 A. Yes.

16 Q. And do you recall, as you sit here now, what her advanced
17 degree was?

18 A. Yes. She had a master's in English literature, I believe.

19 MS. KLEIN: Your Honor, I would move to have
20 Defendant's Exhibit Z admitted, the résumé of Nicole
21 Matthiesen.

22 MR. RISK: No objection.

23 THE COURT: Z is received.

24 (Defendant's Exhibit Z received in evidence)

25 MS. KLEIN: May I approach?

C8DMKADT

Romano - direct

1 THE COURT: You don't need to ask. It's a nonjury
2 trial.

3 Q. Up until this last résumé, are all of these graphic
4 consultants that were hired before Ms. Kadden?

5 A. Yes.

6 Q. And were all of the graphic consultants that we just went
7 through hired to perform the same duties?

8 A. Yes.

9 Q. And what was their primary duty and responsibility?

10 A. Primary duty and responsibility of a graphics consultant is
11 to review case materials and to come up with the most effective
12 strategic presentation of key case facts and to buttress any
13 case weaknesses to help our clients help their clients to win
14 their case.

15 Q. Do the graphic consultants manage anyone at Visualex?

16 A. Yes.

17 Q. And who do they manage?

18 A. Everyone.

19 THE COURT: What does that mean? They don't manage
20 you.

21 THE WITNESS: I'm a graphic consultant.

22 THE COURT: You're also the head of the firm. Who do
23 the other graphic consultants manage?

24 THE WITNESS: They manage the studio staff. The
25 graphic consultant is the one who is developing the individual

C8DMKADT

Romano - direct

1 graphics, and then they have to convey what the takeaway needs
2 to be and what needs to be done to the studio who actually
3 executes the layout. They have to tell the production
4 coordinator what needs to go out when and what order, who it
5 needs to be sent to, those kinds of things. They are basically
6 the one pulling the strings to get the case through the door.

7 THE COURT: When you say manage, is that like a direct
8 report? Could they say to such an employee, no, you can't take
9 off tomorrow?

10 THE WITNESS: Yes. Because when you're managing --

11 THE COURT: Do they hire those people?

12 THE WITNESS: I make all the final hiring decisions.
13 But when we are looking for consultants, they are always
14 interviewed by the other consultants because we are working so
15 closely.

16 THE COURT: I'm talking about the graphic artists, the
17 ones that produce the drawings, do they hire them?

18 THE WITNESS: No.

19 THE COURT: Do they fire them?

20 THE WITNESS: No.

21 THE COURT: Do they write out employee reviews with
22 them?

23 THE WITNESS: No.

24 Q. Does Visualex have a formal review process?

25 A. They are supposed to be, but we are such a small

C8DMKADT

Romano - direct

1 business -- there is supposed to be a yearly review, but it
2 rarely happens, just because there is other things going on.

3 Q. Is trial graphics a recognized professional field?

4 A. Yes.

5 Q. Do you know for how many years it's been a recognized
6 field?

7 A. It started -- LSI was the first one to ever use graphics at
8 a trial, and I believe it was an explosion of a sewer line in
9 Louisville, Kentucky, and that was in the early '80s.

10 Q. And is there a professional association for litigation
11 graphic consultants?

12 A. Yes.

13 Q. And what is that?

14 A. It's called ASTC, the American Society of Trial
15 Consultants. It's all trial consultants, jury consultants, and
16 graphics consultants participate.

17 Q. Had Visualex consultants been featured speakers for any
18 legal and social science organizations?

19 A. Yes.

20 Q. Can you tell me where?

21 A. A lot of different engagements, the American Bar
22 Association, Practicing Law Institute, American Society of
23 Corporate Counsel, all -- we do a lot of education and
24 presentations, CLE courses, those kinds of things.

25 Q. Have you written about your profession?

C8DMKADT

Romano - direct

1 A. Yes.

2 Q. And have you been published?

3 A. Yes.

4 Q. And can you tell us where you've been published?

5 A. The National Law Journal, I think twice, and then the
6 Massachusetts Lawyer, which I think got picked up by a bunch of
7 other trade publications.

8 Q. Did there come a time in 2008 that Visualex was looking to
9 hire a new graphic consultant?

10 A. Yes.

11 Q. What steps did Visualex take, if any, to fill the position?

12 A. We retained a few headhunters. I believe we put an ad on
13 the ASTC website, and I think we placed ads on Monster.com.

14 Q. Are you familiar with the name the Cowen Group?

15 A. Yes.

16 Q. Can you tell me who they are?

17 A. They are a headhunter.

18 Q. In 2008, when you were looking to hire a graphic
19 consultant, did you have any interaction with the Cowen Group?

20 A. Yes.

21 Q. Did you have communications with them?

22 A. Yes.

23 Q. Do you recall what the form of the communication was?

24 A. Some phone calls, but predominantly e-mail.

25 MS. KLEIN: Your Honor, I would like to hand the

C8DMKADT

Romano - direct

1 witness Defendant's Exhibit C, please.

2 MR. RISK: No objection.

3 THE COURT: No objection to C. C is received.

4 (Defendant's Exhibit C received in evidence)

5 Q. Do you recognize the first page of Exhibit C?

6 A. Yes.

7 Q. And can you tell me what this is, please?

8 A. It's actually the cover letter from Cowen Group for Adina
9 Kadden's résumé.

10 Q. And who was this from?

11 A. Jared Coseglia.

12 Q. Did you receive Exhibit C in connection with the position
13 that you were looking to fill?

14 A. Yes.

15 Q. Can you tell us what, if anything, you did as a result of
16 receiving this document?

17 A. After reviewing it, I believe that I contacted Jared and
18 said that based upon the experience and education that I would
19 be interested in interviewing this candidate.

20 Q. And what, in particular, do you remember was the
21 educational part of it that you were interested in?

22 MR. RISK: Objection. Leading.

23 THE COURT: I don't think that was leading. Maybe I
24 didn't hear it.

25 Q. I said, what, if anything, was the educational requirement

C8DMKADT

Romano - direct

1 that she found interesting?

2 THE COURT: Maybe it's the word requirement. What was
3 the educational qualification that you found interesting?

4 THE WITNESS: She was a lawyer.

5 Q. Do you recall whether or not Ms. Kadden had any other
6 experiences concerning graphic consulting?

7 A. Yeah. Actually, the two other things that intrigued me
8 were that she worked at the U.S -- the Attorney General's
9 office and that in conjunction with that position she was
10 working with -- to develop the graphics presentations that were
11 used, and she also worked at a competitor of Visualex, Doar, as
12 a graphics consultant doing the same position that I was
13 looking to fill.

14 Q. And were you familiar with Doar?

15 A. Yes.

16 Q. And how are you familiar with how the consultants worked at
17 Doar, since you didn't work at Doar?

18 A. Because Kim Nawyn was also from Doar and she was very
19 successful as a graphics consultant with Visualex.

20 Q. Did Visualex ultimately decide to interview Ms. Kadden?

21 A. Yes.

22 Q. Did you participate in the interview?

23 A. Yes.

24 Q. And who, if anyone, else did?

25 A. I know Kim interviewed her. I'm not exactly sure if Brian

C8DMKADT

Romano - direct

1 did or not. It's kind of a long time ago. I can't remember.

2 Q. Did you have a one-on-one interview with Ms. Kadden?

3 A. Yes.

4 Q. And at the interview did Ms. Kadden talk about her
5 qualifications and her experience?

6 A. Yes.

7 Q. And what did she tell you about her qualifications and
8 experience?

9 A. She told me that she was a lawyer and that she had worked
10 at the Attorney General's office and actually, that was a large
11 part of it, that she was actually working -- that was the first
12 time that she had had actually been exposed to that whole
13 graphics process and that she really liked that aspect of the
14 field. And then, of course, that she had been in litigation.
15 That kind of led her to taking the position at Doar, where she
16 performed the same kinds of job duties that we were looking
17 for, which is basically consulting with clients to come up with
18 case presentations and case strategies, and due to some
19 downsizing at Doar she had been let go and that was always
20 something she always enjoyed doing and she would like to get
21 back into the field.

22 Q. Did she discussed whether she worked as a consultant alone
23 or as part of a team?

24 A. As part of a team. Doar had multiple consultants as well,
25 just like Visualex does.

C8DMKADT

Romano - direct

1 Q. I know it's an obvious question, but were you interested in
2 Ms. Kadden as a result of the interview?

3 A. Yes.

4 Q. And did you ultimately offer her a position?

5 A. Yes.

6 Q. Did you discuss with her what the timing of the position
7 was, meaning when you were looking to have someone start?

8 A. Yes.

9 Q. And when did you want someone to start?

10 A. I wanted someone to start immediately. We were really,
11 really busy, and I wanted -- and we needed help desperately,
12 and I wanted somebody who could hit the ground running as soon
13 as possible.

14 MS. KLEIN: That box is music to my ears.

15 THE COURT: Thank you.

16 MS. KLEIN: Your Honor, there should be an electronic
17 disk in there that has all the exhibits if you want it.

18 Q. She was ultimately hired?

19 A. Yes.

20 Q. And the job that you hired her for was?

21 A. Graphics consultant.

22 Q. At the time that you hired Ms. Kadden, how were graphic
23 consultants compensated?

24 A. At time they had a base salary, and then we paid incentive
25 overtime compensation.

C8DMKADT

Romano - direct

1 Q. And who made the decision to pay consultants overtime
2 compensation?

3 A. I did.

4 Q. And what was the reason that you had made that decision?

5 A. The reason was that I felt that I wanted to incentivize
6 people along the way as opposed to having to wait for a bonus
7 at some later time. I had been in the industry with three
8 different companies for 15 years when I started Visualex, and I
9 just wanted to make sure that the compensation would
10 incentivize people to work as hard as you need to work when
11 you're a consultant.

12 Q. When you were working as a consultant in the entire time
13 that you worked in your profession, have you ever been given
14 the days off and then been required to report to work at night?

15 THE COURT: I'm sorry. I'm losing you.

16 MS. KLEIN: I lost myself on that one.

17 During her years as a consultant I wanted to know
18 whether or not she worked the night shift?

19 THE COURT: Did she ever just work nights is what you
20 are asking?

21 MS. KLEIN: Yes.

22 A. No.

23 Q. Is the predominant part of the work of a consultant done
24 during evening hours?

25 A. Predominant, no.

C8DMKADT

Romano - direct

1 Q. And when is the work generally done?

2 A. It's done while you're in the office. It starts at 9 and
3 it goes -- it can go all night certainly, but we certainly
4 don't sit there from 9 to 6 and do nothing and wait to, all of
5 a sudden, the witching hour comes at 6:00 and people start
6 asking you for stuff.

7 Q. When you offered Ms. Kadden a job, did you offer her an
8 employment contract?

9 A. No.

10 Q. Was the offer of employment memorialized anywhere?

11 A. Yes.

12 Q. And where was it memorialized?

13 A. In an offer letter.

14 Q. Did a lawyer draft the offer letter?

15 A. I wish, but no.

16 Q. And where did that offer letter come from?

17 A. Actually, again, you know, having been in the industry and
18 several companies prior to starting Visualex, I took my offer
19 letters and kind of pick and choose the basis of it and then
20 added, obviously, some things that were just unique to
21 Visualex.

22 Q. What were the things that were unique to Visualex?

23 A. The incentive overtime compensation.

24 MS. KLEIN: Your Honor, I would like for the witness
25 to look at Defendant's Exhibit E.

C8DMKADT

Romano - direct

1 MR. RISK: No objection.

2 Q. Ms. Romano, are you familiar with this document?

3 A. Yes.

4 Q. And what is it?

5 A. It's the invoice from the Cowen Group for the placement of
6 Adina contacted.

7 Q. Did you pay a placement fee for her, a finding fee?

8 A. Yes.

9 Q. How much did you pay?

10 A. \$18,750.

11 Q. Has Visualex ever paid that amount of money for a
12 nonprofessional staff?

13 A. No.

14 MS. KLEIN: It's already admitted since there is no
15 objection.

16 THE COURT: No objection, E is admitted.

17 (Defendant's Exhibit E received in evidence)

18 Q. Do you recall the annualized base salary of Ms. Kadden's
19 offer?

20 A. Yes.

21 Q. And what was it?

22 A. \$75,000.

23 Q. During Ms. Kadden's employment was her annualized base
24 salary ever reduced to below 75,000?

25 A. No.

C8DMKADT

Romano - direct

1 Q. I ask you to do a little math. Do you know what Ms.
2 Kadden's annualized base salary was on a weekly basis?

3 A. I think it was around \$1500.

4 THE COURT: I'm sorry?

5 THE WITNESS: Around \$1500 a week.

6 Q. Where does the majority of the work of the graphic
7 consultant take place?

8 A. In our office.

9 Q. And who is the primary beneficiary of the work of the
10 consultants?

11 A. Our clients.

12 Q. And during Ms. Kadden's employment did she perform the job
13 of a graphic consultant as you described it today?

14 A. Yes.

15 Q. Does Visualex have and did they, during Ms. Kadden's
16 employment, a philosophy regarding what it is to be a
17 consultant?

18 A. Yes.

19 Q. Can you explain to the Court what that philosophy is?

20 A. We tried to separate ourselves from our competitors, and
21 what we say to clients is we are not wrists. We don't blindly
22 follow. We don't regurgitate what a trial team tells us to do.
23 We basically review materials and we recommend, based on our
24 experience, what we think the best way to present information
25 to the trier of fact is, and we also really are very proactive

C8DMKADT

Romano - direct

1 in teaching ourselves and learning the really complex concepts
2 so that we can have intelligent conversations with experts and
3 that also we can review every graphic that's created to make
4 sure that, in our opinion, we think it is the most effective
5 way to present the information.

6 Q. Are you familiar with a case called CIEA?

7 A. Yes.

8 Q. And what did that case deal with?

9 A. It's actually a patent case that had to do with transgenic
10 mice, which is basically -- obviously, when you want to do
11 research, medical research on cancer drugs, you can't do it on
12 humans, can't give humans cancer and then try to see what works
13 and what doesn't. So what they basically do is breed mice and
14 they get rid of the mouse immune system, and they actually put
15 human cells in there which causes the mouse to have a human
16 immune system, and then they can see what drugs are working.

17 Q. And who are the graphic consultants that worked on the CIEA
18 case?

19 A. Actually, all three of us worked on that case.

20 Q. When you say all three?

21 A. It's myself, Adina Kadden, and Kim Nawyn.

22 Q. And the information that you just testified about regarding
23 how it worked and what it was about, was that in information
24 given to you by the trial team?

25 A. The background information was given to us. That case

C8DMKADT

Romano - direct

1 actually was such a difficult concept that we did a lot of
2 Internet research. One of the things that we often take
3 advantage of are any kinds of sites that sometimes teach
4 children about these kinds of things because when you are
5 trying to explain these complex concepts to jurors, sometimes
6 looking like on how the body works, those kinds of things, help
7 you to distill it down so it's easier to understand.

8 Q. What is your philosophy about not being wrists? What does
9 that mean when you say not to be a wrist?

10 A. We just don't blindly follow. A lot of times attorney will
11 say I need and we always stop them and say, no, tell us what
12 you want the takeaway to be, and we will tell you what you
13 need. Don't tell us what you want. We will tell you what you
14 need in order to convey that point. There are -- basically, we
15 are not just regurgitating -- if they say we want a pie chart
16 and we say okay here is a pie chart, that's not what we do at
17 all. We bring value.

18 Q. Why don't you just do what they need or ask you for?

19 A. Then they wouldn't really need us. They are hiring us
20 because we are experts in this field, and that's our job, to
21 recommend to them the best way to portray the information, and
22 also a lot of times when we get involved the attorneys have
23 been working on the cases for years and years and years. They
24 get so close to the information, we will come to them and say,
25 we don't understand that. And if we don't understand that,

C8DMKADT

Romano - direct

1 obviously, it's something that needs to be explained to the
2 jury or to a judge, so we help them also identify areas where
3 they should be targeting for the use of graphics.

4 Q. Are you familiar with a case called Wells Fargo?

5 A. Yes.

6 Q. And how are you familiar with that case?

7 A. It was another case that Visualex was retained on.

8 Q. And who were the graphic consultants that worked at
9 Visualex on Wells Fargo?

10 A. Again, it was myself, Kim, and Adina, all three of us.

11 Q. And did the three consultants in either this case or the
12 one you just talked about have different roles?

13 A. No. We are all responsible for coming up with the best way
14 to present the evidence.

15 Q. And can you explain to us how it works when there is more
16 than one consultant assigned to a case?

17 A. Yeah. One of the other things that we do that sets us
18 apart is that we always want to have a person in the office who
19 is smart about the business. So all of us, at least two
20 consultants and oftentimes all three consultants, will read all
21 the case materials because if any one of us is out, you don't
22 want the client to have to call and say, this is what the case
23 is about. You want to have a smart person there so they can
24 respond to any requests.

25 And, also, since it's such a iterative process and

C8DMKADT

Romano - direct

1 you're constantly communicating back and forth, you have to
2 have the base knowledge of the facts of the case and an
3 understanding of what needs to be communicated so that you can
4 evaluate. As each exhibit comes through and is created you can
5 evaluate, does it do what it's supposed to do.

6 Q. Does that evaluation process only take place when the
7 exhibit or the demonstrative is first created?

8 A. No.

9 Q. Can you explain to us that?

10 A. That evaluation is constantly taking place. Again, that's
11 what we are doing as consultants, is taking place internally,
12 before a layout ever goes out to a trial team, and then it's
13 taking place when the trial team then communicates changes or
14 concerns about what they have reviewed. And so what you are
15 doing as a consultant is constantly, you are always passing
16 everything through that filter of, does this do what it's
17 supposed to do. And if the answer is yes, the second question
18 needs to be, does it do it in the best way possible? And if
19 the answer is no, then you need to come up with a different
20 approach.

21 Q. And is it possible that, for example, simply a change of a
22 color could change the takeaway?

23 A. Yes.

24 Q. Can you explain that to us?

25 A. Because humans process different colors in different ways.

C8DMKADT

Romano - direct

1 Certain colors evoke visceral reactions. So, for example, red
2 usually means dangerous because of stop signs and so we usually
3 use red for our adversaries, and blues and greens are very
4 pleasing colors, so we use them for traditionally our clients.

5 Also, there are instances where a client is a company
6 that has a very well recognized logo that has a color
7 associated with it. For example, we do a lot of work for
8 AstraZeneca, and they are the purple pill. Of course, the
9 AstraZeneca exhibits were purple.

10 Q. And when constantly evaluating through the different
11 iterations of the document, if a client says, oh, I'd like all
12 the text centered, would that make a difference to you as a
13 consultant?

14 A. Yes.

15 Q. Can you explain why?

16 A. Because, again, as a consultant, you understand how humans
17 process information. And just like every novel you ever pick
18 up has left justified text, we read from left to right. So
19 when you center text it makes it very difficult to find the
20 next line. Especially when you're ten feet away in a jury box
21 or ten feet away from a screen, that's exacerbated. We always
22 tell people, don't center your text because it's much easier to
23 read if it's left justified.

24 Q. Would it be the job of the consultant to express that
25 opinion if one of your clients told you to do something that

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1 was center?

2 MR. RISK: Objection, leading.

3 THE COURT: Can you rephrase it?

4 MS. KLEIN: Yes.

5 Q. If a customer of Visualex asked you to center text, is it
6 appropriate for the consultant to give their opinion as to the
7 effectiveness of that?

8 A. Yes. Obviously, again, they are hiring us as experts in
9 visual presentations. So whenever a client -- that's the
10 interaction. That's what we do. Whenever anyone asks us to do
11 something that we don't believe is going to increase the
12 effectiveness of an exhibit and in fact may decrease the
13 effectiveness of an exhibit, we absolutely give our opinion and
14 recommend what we think needs to be done.

15 MR. RISK: Move to strike everything after the answer
16 yes.

17 THE COURT: I don't even recall what it was. I don't
18 have real time up here. I have to hear it all back, unless you
19 agree.

20 MS. KLEIN: I don't agree.

21 THE COURT: Let me hear the whole answer, please.

22 (Record read)

23 THE COURT: I'll allow it.

24 Q. Turning your attention back to the Wells Fargo case, again,
25 just to remind me, who were the consultants assigned to that

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1 case.

2 A. It was the three of us that were there at the time Visualex
3 was retained: Myself, Adina, and Kim.

4 Q. When you say Adina, you're referring to the plaintiff in
5 this case?

6 A. Yes.

7 Q. As you sit here today do you recall whether the Visualex
8 consultants, were they given case information in connection
9 with that case?

10 A. Yes.

11 Q. And is it necessary for the consultants to review legal
12 documents to do their job?

13 A. Yes.

14 Q. Why?

15 A. Because you review anything that is going to get you up to
16 speed on the strategy. Usually, we ask for summary judgment
17 motions, the complaint, the answer, any expert reports,
18 anything that we think is going to get us up to speed so we
19 don't have to drag the trial team down and have them explain to
20 us what's going on.

21 Q. Why don't you not just rely on the information that's given
22 to you by the team, the trial team?

23 A. Because they are not looking at that information in the
24 same way we are. We are looking at that information to
25 determine, A, what's difficult to understand and what should be

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1 supported by a graphic presentation and, B, once we identify
2 that to say, okay, what is the form the information is being
3 conveyed in these legal briefings and expert reports, and is
4 that the best way to present it visually, or is there a better
5 way, and how does that fit in the overall visual strategy that
6 we are developing.

7 MS. KLEIN: Your Honor, I'd like to hand to the
8 witness Defendant's Exhibit G1. And this is one of those, your
9 Honor, that's huge, huge, and I have made summaries for
10 everyone, if that makes it easier.

11 THE COURT: I would rather take the summary.

12 MS. KLEIN: Is that one of the smaller ones? I
13 thought it was one of the bigger ones.

14 THE COURT: Summary or is this the exhibit? Is this
15 the summary?

16 MS. KLEIN: This is the full exhibit of this one.

17 THE COURT: Are you giving me the summary?

18 MS. KLEIN: We broke it down. We broke it down to G1,
19 G2, G3. It's already sectioned off from the other part. We
20 are not going through every page on this.

21 THE COURT: You don't have anything smaller to give
22 me?

23 MS. KLEIN: No. That's it.

24 MR. RISK: Your Honor, it's my understanding that G1
25 is not going to be offered into evidence and it's some sort of

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1 demonstrative.

2 THE COURT: I don't think so. I think it's a portion
3 of what, G?

4 MS. KLEIN: G1 is going to be offered. This was one
5 that was created by Ms. Kadden and --

6 THE COURT: It's a portion of a fuller exhibit?

7 MS. KLEIN: Yes.

8 THE COURT: The fuller exhibit is marked G.

9 MS. KLEIN: Correct.

10 MR. RISK: G1 is indicated DEM 0001.

11 MS. KLEIN: Defendant's Exhibit G1. That is an
12 identification to make it easier for us to get through the
13 pages. This wasn't part of the document production. You
14 didn't ask for it. I put numbers on it to make it easier for
15 the Court to follow the testimony.

16 MR. RISK: I'm sorry, your Honor. I was told I was
17 going to get some demonstratives. This is the only one that
18 indicated G1.

19 THE COURT: But it's not.

20 Q. Ms. Romano, are you familiar with what's been marked as
21 Defendant's G1?

22 A. Yes.

23 Q. I would like to turn your attention to the pages that are
24 numbered DEM 00024 through 25.

25 A. Okay.

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1 Q. Can you tell me what this says?

2 A. These are pages from an expert report from an expert that
3 was testifying in the Wells Fargo case.

4 Q. Can you explain to us what the Wells Fargo case was about?

5 A. Yeah. It had to do with a securities lending program for
6 which Wells Fargo was the trustee, and there were four
7 investors in the trust that lost some money because some of the
8 underlying investments defaulted. And they were suing Wells
9 Fargo basically saying that Wells Fargo should have known that
10 these were going to default. But it was during the time when
11 the whole economy tanked. And so it was our position that
12 nobody could have foreseen the economic crisis and that it was
13 not Wells Fargo's fault.

14 Q. And during Ms. Kadden's employment while she was working as
15 a consultant, was she required to review pages DEM 000024 and
16 25?

17 A. Yes. All three of us read all -- were supposed to read all
18 of the case documentation for this case.

19 Q. And the purpose of reviewing these particular pages was
20 what?

21 A. Well, these were pages that jumped out at us, obviously,
22 since the case had to do with securities lending program. The
23 first thing we had to teach the jury was, what does that mean
24 and how does it work so that they could evaluate whether it
25 worked the way it was supposed to in determining who had the

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1 responsibility for the money that was lost by the plaintiffs.

2 Q. And did the consultants imagine a way to depict this
3 information that's on 24 and 25?

4 A. Yes.

5 Q. Can you explain to the Court what it is that you did?

6 A. Yes. If you look at DEM 13, we basically developed a flow
7 chart, and oftentimes because the way humans learn is through
8 repetition and reinforcement, we developed a base flow chart
9 that had all of the steps -- all of the parties involved in the
10 process. And then we pull off some explanatory texts for each
11 of the steps and then you light up things. Again, it's a way
12 of being able to spoonfeed the jury, help the expert explain a
13 complex concept that they probably weren't familiar with.

14 So in the first one you can see that the lenders sell
15 their securities to or give their securities to Wells Fargo.
16 And then if you go to the next one you can just see how -- if
17 you go to the next step is that the borrower borrows the
18 security and so on. If you just scroll through these, you can
19 see we basically came up with a flow chart that enabled the
20 expert to explain every step in the securities lending process.

21 Q. If you could just take a look back at DEM 000014.

22 A. Yes.

23 Q. Can you look at this and tell us what was the intended
24 takeaway for your client?

25 A. Well, we wanted to show what was actually happening. And

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1 so obviously you can see that -- first thing that we do is
2 craft a title that basically tells what the exhibit is about.
3 So this is how the securities lending program works. And then
4 in this particular step we are explaining what the borrower
5 does. So the borrower borrows the security and then he has to
6 post cash collateral at 102 percent in the event there is --
7 any value is lost. So the 102 percent collateral covers that.
8 That's basically what I was trying to explain.

9 Q. And do your clients tell you what the title should be?

10 A. No.

11 Q. Who crafts that?

12 A. The consultant crafts it. The title is probably the most
13 important thing on any graphic. And what we always tell
14 clients is that, you know, we will craft a title that gives the
15 takeaway. And sometimes you really, really push the envelope
16 on the title because the theory behind it is that if the jury
17 doesn't even do anything other than read the title, they
18 understand why you are showing them the graphic and what the
19 takeaway is. We also pick the colors, so, obviously, this is
20 an exhibit that's going to be used in furtherance of our
21 position in the case, which is why it's blue. Green for money
22 so that people understand what's happening. We developed
23 icons. Again, icons are the little pictures of things. So the
24 securities, it looks like a little stock certificate. All of
25 these things just make the concepts less intimidating to a jury

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1 so that they are more comfortable with it.

2 I am not going to give a psychology lesson, but,
3 basically, what you want to avoid is something called cognitive
4 dissidence, which is that juries shut down if they don't know
5 what to do with information. They either distort it,
6 misrepresent it, or minimize its importance. You don't want
7 them to do that for any of the things that you think are
8 important to advancing your case. We try to make it as easy as
9 possible for them to understand things.

10 Q. I would like you to look in also G1 DEM 000019 through DEM
11 000021. Can you explain to us what this is?

12 A. Yes. This was also from an expert report. And one of the
13 things that we felt was important is to make the point that
14 Wells Fargo, in addition to being the trustee, also invested in
15 the trust. And so it was to go to motivation. What would our
16 motivation be to invest in things that we thought were going to
17 lose money if we had the most to lose and we were actually
18 invested in the trust as well. So this was an appendix to the
19 expert report. And, obviously, you can see, if you scroll
20 through this, there is just a lot of names with numbers. And
21 if you were to show it to a jury this way, you would be forcing
22 them to do a lot of analysis and evaluation to figure out.
23 Number one, what does it mean and how does it fit with the
24 overall scheme of your case? And so what we do as consultants
25 is recommend the best way to take this information and put it

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1 in a visual form so it's easier to understand.

2 Q. Who were the consultants that worked on figuring out a
3 visual strategy and takeaway for these particular three pages?

4 MR. RISK: Objection, leading.

5 THE COURT: Who were the consultants? What's the
6 leading part?

7 MR. RISK: I think the question is eliciting the
8 answer that Ms. Kadden did the strategic work.

9 THE COURT: She is saying identify the experts who
10 worked on it. That's not leading.

11 Who worked on this one?

12 THE WITNESS: We all worked on it. All three of us:
13 Adina, myself, and Kim. As I said, there is always at least
14 two and in this particular one there were three of us.

15 Q. Please turn your attention to DEM 000044 through DEM
16 000056.

17 Can you tell me what this is that we are looking at?

18 A. Again, this is information that was provided to us by an
19 expert, and this was a listing. And if you scroll through it
20 it's just pages and pages and pages of issuers. Basically, in
21 the case these are 416 securities that the plaintiffs alleged
22 were unsuitable and should not have been invested in.

23 MS. KLEIN: I apologize. I skipped something. Can I
24 have us move back.

25 Q. The last expert report that you were testifying about,

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1 pages 19 through 21, did you turn that into a visual?

2 A. Yes, we did.

3 Q. And what visual is that in this packet?

4 A. It's DEM 22.

5 Q. And can you please turn to that page. And can you explain
6 to us what it is that is trying to be conveyed in DEM 22?

7 A. In DEM 22, as I said, the takeaway was that Wells Fargo was
8 the largest participant in the trust and, therefore, what would
9 their motivation be to invest in unsuitable investments. All
10 of those names that you would have forced a jury to go through
11 and try to find them, we basically applauded it in a bar chart
12 and we color Wells Fargo blue because it's our client and you
13 can clearly see that it makes the point much more effectively
14 that they were the largest participant and therefore had the
15 most to lose.

16 And this is kind of how the process works. Once we
17 develop this and send it to the client for a review, they said,
18 this is great, it absolutely works, but what it doesn't do is
19 show what Wells Fargo percentage is compared to the plaintiff's
20 in the case. And I said, okay, we can do something that builds
21 upon this.

22 And if you go to DEM 23, instead of doing a bar chart
23 for that one, we actually decided that pie charts were the
24 better way to convey that information because we -- it wasn't
25 necessary to see what everyone else was doing. Now we were

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1 just focused on the four plaintiffs and Wells Fargo. By
2 pulling that piece out of the pie, you separate that and focus
3 the attention and then we color-code each of the plaintiffs, so
4 it was very easy to find what any one of them's percentage was
5 in comparison to Wells Fargo.

6 Once they received that pie chart, they said, wow,
7 this is great, but there are reasons, strategic reasons we want
8 to show certain points in time and how that percentage that
9 Wells Fargo still remained the largest participant over a
10 relevant time period. And so we said, okay, we can do four pie
11 charts on one so you can see that trend easily.

12 Q. And did the clients at Visualex tell you when this case
13 started that they wanted a demonstrative exhibit that had four
14 pies on it?

15 A. No.

16 Q. Did they ultimately use those?

17 A. Yes.

18 Q. Do you know what the outcome of the case was?

19 A. Actually, we technically lost, but it wasn't a large award,
20 so it was considered a win by the client.

21 Q. Now, if you could go back to the 44 through 56. If you can
22 walk us through and explain to us what the consultants did in
23 connection with this information.

24 A. Again, what I mentioned earlier, that this is a list of the
25 400 somewhat unsuitable investments as alleged by the

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1 plaintiffs. And what we needed to show is that the strategy
2 that Wells Fargo employed in dealing with the economic downturn
3 was called a hold to maturity strategy. And so basically we
4 had to explain that if we had sold these unsuitables as soon as
5 the market started tanking we would have definitely incurred
6 really, really large losses. So we felt that the best course
7 of action was to hold them and hopefully the economy would come
8 back and that some of them would either be sold or mature at
9 par.

10 Q. Ms. Romano, when you say what we needed to show, I think
11 you said that through a couple of the exhibits we have gone
12 through, who is the we you are referring to?

13 A. The we -- the we is the consultants at Visualex and the
14 trial team. We consider ourselves part of the trial team. And
15 so we really don't make much of a distinction between that when
16 we are dealing with the visual presentation. Our clients, we
17 consider them -- we are an extension of our clients.

18 Q. Please continue explaining the process.

19 A. If you scroll through this, you can see that is mind
20 numbing and nobody would be able to tell what this is actually
21 trying to convey. And so we needed to figure out a way to
22 present this information in a fairly simple matter.

23 Actually, if you look at the headings up at the top,
24 you can see that there is a lot of information here. When we
25 receive something like this, obviously, there is a lot of

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1 information here. Since you're constrained by the size of a
2 screen -- we used to do boards. We don't do boards anymore.
3 Even so, you have a finite area to put something on. This
4 would be a difficult task to convey all of this information.
5 And so what you do as the consultant is say, well, explain to
6 me what is the most important takeaway that you want to get
7 from this and the most important takeaway is that the hold
8 maturity strategy was right, that maturity date, the face
9 amount, all of this stuff is irrelevant to make that point.

10 If you look at the status column, that's really the
11 key information, whether it's matured, whether it's sold,
12 whether it actually in fact defaulted. That's the column we
13 focused on and decided to come up with a visual representation
14 of these 400 some odd securities focused on what was occurring
15 in that column.

16 Q. Can you tell us how the consultants recommended to their
17 clients to visually depict this information?

18 A. Yes. If you look at DEM 57, there were actually three
19 trusts at issue here. And so the first thing that we did is
20 separate it into three separate exhibits, one for each trust,
21 so that we had the room to be able to make the representation
22 of each issuer is represented by a box. We were able to get
23 bigger sizes on it by not putting all 400 on one. So we broke
24 it down by trust. You can see, these are the 170. Those were
25 the big lists. There was 170 of those in the business trust.

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1 And then if you bring up DEM 58, if you went down that
2 column, you would see that only three out of the 170 defaulted,
3 so it was a very small percentage.

4 And then if you look -- that was actually the simpler
5 of the three. If you look at DEM 60, this was the collateral
6 investment trust. That status column had several other types
7 of identifiers. So 188 matured at par. That's actually not so
8 bad, 188 out of 216. 13 were sold, one was transferred or
9 matured, 12 were extended, and only one defaulted. Obviously,
10 the hold to maturity strategy was the correct strategy to
11 protect the investors in their investment.

12 Q. And was this demonstrative exhibit that we are looking at
13 ultimately used in the courtroom?

14 A. Yes.

15 Q. Is it fair to say that that was the ultimate product that
16 was produced?

17 A. That was displayed in the courtroom. The Wells Fargo case
18 had over 400 exhibits when all was said and done. It was a
19 pretty complicated case and it lasted for three weeks. A lot
20 of expert witness testimony, really dense financial
21 information.

22 MS. KLEIN: Your Honor, I'd like to move to have G1
23 admitted.

24 MR. RISK: Objection, your Honor. All but four or
25 five pages were not listed in the pretrial order.

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1 THE COURT: I'm sorry. Double negative. I don't
2 understand what you said.

3 MR. RISK: This exhibit is not in the joint pretrial
4 order, except for five pages are.

5 THE COURT: You mean G1?

6 MR. RISK: That's right.

7 THE COURT: I thought she said it's all there, but
8 this is breaking out portions of G, which was a real fat
9 exhibit.

10 MS. KLEIN: This was on the revised exhibit list that
11 we submitted to the Court. You were correct, it wasn't on the
12 original one that was part of the first pretrial order. And
13 then we submitted a revised one, as you also, counsel, reserved
14 your right to, as we got closer, put specific numbers in.
15 Clearly you have known about this for weeks.

16 MR. RISK: I first saw these documents in the evening
17 of August 9. Four or five of them are on the original pretrial
18 order.

19 THE COURT: Anyway, what are we going to do? I have
20 seen them already. It's a nonjury trial. They are just
21 graphics. I get the point of what graphics are. I have tried
22 a lot of cases.

23 MS. KLEIN: Your Honor, I do apologize. I know your
24 Honor has, but this is unfortunately the substance of the case.

25 THE COURT: I am going to overrule the objection. I

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1 know what graphics are.

2 Q. I would like you to take a look at what we have marked as
3 G3.

4 MS. KLEIN: May I approach?

5 MR. RISK: Your Honor, for the record, I am going to
6 make the same objection that these were not in the pretrial
7 order.

8 THE COURT: Overruled.

9 Q. Ms. Romano, have you ever seen G3 before?

10 A. Yes.

11 Q. Can you tell us what this is, generally?

12 A. This is an expert report from a different case. We called
13 it the SCOR arbitration. It was basically an arbitration that
14 we did on behalf of Allianz that was related to the World Trade
15 Center insurance coverage litigation that we did actually down
16 the hall in Judge Mukasey's courtroom. But this had to do
17 with, obviously, there was a lot more money that the insurance
18 company had to pay out than that he thought because of the
19 global settlement. And this was Allianz trying to recover
20 their payout from their reinsurance company, which was SCOR.

21 Q. Who were the consultants at Visualex who worked on the SCOR
22 arbitration?

23 A. Again, it was the three of us that were there at the time
24 Visualex was retained: Myself, Adina, and Kim Nawyn.

25 Q. Were the job responsibilities in connection with the

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1 graphic consulting divvied up between the three of you?

2 A. We all were all responsible to do the same thing. I don't
3 know what you mean by divvy up.

4 Q. Did each of you have specific tasks?

5 A. Our specific tasks were to consult on the case, to
6 generate --

7 Q. Were the three of you consulting on different areas?

8 A. No.

9 Q. Can you please take a look at DEM 000080 through 82, which
10 is part of G3, and explain to the Court what this is?

11 A. This is, again, from the expert report. One of the things
12 that was important to show is what SCOR's motivation was to go
13 along with the settlement during the negotiations and not say
14 anything about thinking that Allianz was doing anything wrong
15 by agreeing to the settlement. And so the explanation that the
16 expert was giving was that SCOR had experienced an economic
17 downturn, and the way you can evaluate the financial strength
18 of the company is by looking at their ratings given by the
19 ratings agencies. This is an appendix to the expert report and
20 this is how he presented the information. And once we received
21 that, we felt that that was not the most effective way to make
22 that point.

23 Q. So what advice did Visualex give its client in order to
24 advance its client's case?

25 A. We recommended that the tabular type of presentation of the

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1 information should be converted to a line chart so you could
2 actually follow and see the trend. And then you could also
3 focus on the particular relevant time in the context of what
4 happened before.

5 Q. And Were the consultants able to figure out a visual
6 strategy that would get your client's point across?

7 A. Yes.

8 Q. And is that contained within G3?

9 A. Yes. If you look at DEM 83. So the first thing to note
10 here is that the graphic is red, got a red title band. As I
11 mentioned earlier, red has a visceral response of stop, bad,
12 whatever. The consultant would say, we want this to be a red
13 exhibit.

14 The second thing you will notice is the takeaway,
15 which is SCOR's weak capital levels and deteriorating
16 performance were damaging to their credit profile. You see you
17 have the whole chart, but part of it is way back because what
18 we want to be able to focus on is the time prior to the time of
19 the relevant month, because we want to show all of the ratings
20 agencies' downgrading score. That tabular thing that we showed
21 earlier, basically, what we did, we gave a circle and a number
22 to each of the four rating agencies and they are the big ones,
23 S&P, A.M. Best, Moody's, and Fitch.

24 Every time the rating changed, we put the circle in
25 there so I could follow the trend. Then we added the dotted

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1 line because once you fall below a A minus credit rating,
2 people in the market don't want to go near you. That was kind
3 of the demarcation that we wanted to be able to explain to the
4 arbitration panel, that once they fell below this, obviously,
5 you can see that ratings agencies were downgrading them.

6 Q. Why is this important to your client's case?

7 A. Because other than -- if you were to try to explain this
8 concept using that tabular information, I don't know about you,
9 but I didn't get that takeaway from that appendix, from the
10 expert report, but this really is an instantaneous, you can
11 definitely see what's happening, you can see the trend. Yet,
12 you are also able to follow individual ones of the ratings
13 agencies, if necessary. And so it really armed the expert with
14 a wonderful vehicle of being able to explain this point.

15 THE COURT: How many more of these demonstratives do
16 you want to show in this trial? Because I get the point. I am
17 not going to sit through 50 more demonstratives at all. How
18 many more do you think --

19 MS. KLEIN: Right now this is the last one I have for
20 this and then there was specific ones, which we don't have to
21 go through if counsel is going to admit. I have tons of them
22 that have Ms. Kadden's handwriting all over them. Unless she
23 is going to admit, which I would assume and hope that she
24 would, that that was her consulting on them, it's her initials
25 all over them. This is what the case is about, whether or not

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1 she was acting as a consultant.

2 THE COURT: I don't know that that's what the case is
3 about.

4 MS. KLEIN: That's what I understand the case to be.

5 THE COURT: Not me.

6 MS. KLEIN: Is whether or not the job duties and
7 responsibilities that she was doing were exempt.

8 THE COURT: That's right. In other words, there may
9 be no disagreement that she was working on these graphics and
10 her initials show she was working on these graphics. That
11 doesn't decide the case. Then there is the question of law for
12 me to decide whether the person who does this work, creating
13 and changing and revising these graphics, is exempt. That's
14 for me.

15 MS. KLEIN: Yes.

16 THE COURT: I don't know that there is any factual
17 disagreement. Indeed, she may agree she worked on these
18 exhibits.

19 MS. KLEIN: Again, I think the question goes to, she
20 didn't work on them in the sense -- she wasn't responsible for
21 actually producing them.

22 THE COURT: Not the artwork, I know.

23 MS. KLEIN: But in regards to understanding the
24 underlying legal issues, reading them, reviewing them, making
25 an analysis and determination.

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1 THE COURT: I understand that. Something Ms. Romano
2 is perfectly capable of doing, too, and she is not a lawyer.

3 MS. KLEIN: Yes.

4 THE COURT: I get it.

5 MS. KLEIN: Again, it goes right towards all of the
6 different exemptions.

7 THE COURT: I know it does. I'm losing what we are
8 debating here.

9 Maybe you can help, Mr. Risk. Your client doesn't
10 disagree. She worked on these exhibits with the graphic
11 artists.

12 MR. RISK: Your Honor, the question is what she did on
13 these exhibits.

14 THE COURT: When you get her on the stand, you will
15 ask her.

16 MS. KLEIN: When we talk about what she did on that,
17 then we are going to have to go through --

18 THE COURT: I'm telling you both right now, there is a
19 limited number I will go through. We have probably gone
20 through five or six. I'm not going to go through a hundred, I
21 am not going to go through 50.

22 MS. KLEIN: Two different cases.

23 THE COURT: Five or six or seven exhibits from other
24 trials. That's about enough. You want to go to ten, fine, but
25 that's it. Three more of these, maybe? I don't need them,

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1 really. I understand trial exhibits. I've been doing this for
2 years and seeing all these exhibits. Now it's nice to know how
3 they got made, but I assume they got made that way all along.

4 MS. KLEIN: Your Honor, what is important, not to
5 disagree at all, is showing what is the value, if any, what is
6 the part that the consultant is doing.

7 THE COURT: I understand. It's a creative process.

8 MS. KLEIN: It is using independent thought,
9 knowledge --

10 THE COURT: It's all of that. There is a process of
11 creating it. First, there was this ugly list of tightly packed
12 data that somebody wants to read and suddenly there is one
13 chart. It morphed from a list to a chart. It took a few
14 people to do that. It took the graphic people and the
15 consultant people and the lawyer people back at the law firm.
16 And those three groups together, the lawyer people, the
17 consultant people and the graphic people, together came up with
18 this.

19 MS. KLEIN: It does. What is important is whether or
20 not what they came up with something is a matter of
21 significance. It matters directly towards the exemption.
22 Again, I am not going to go through tons more.

23 THE COURT: That's really a legal argument. Showing
24 me endless exhibits doesn't change that. I understand these
25 are exhibits and you use it at trial. That's all you need to

C8DMKADT

Romano - direct

1 say about matters of importance. If that's what the law
2 defines as matters of significance. In other words, one
3 exhibit to the other doesn't make that difference. I get trial
4 exhibits. You see my point?

5 MS. KLEIN: I do. I apologize for having to go
6 through this. I also just to make sure that I am showing -- I
7 don't want to assume --

8 THE COURT: You showed seven or eight. I am saying
9 stop at ten. That's enough.

10 MS. KLEIN: May I proceed, your Honor?

11 THE COURT: Yes.

12 Q. Please look at DEM 000084, Ms. Romano. That's part of G3?

13 THE COURT: That's part of what?

14 MS. KLEIN: G3. You have that.

15 THE COURT: Great.

16 Q. Just looking at this, can you tell me what it is that the
17 consultant was recommending to the client?

18 A. Well, the first thing is so, again, because it's repetition
19 and reinforcement, we are building on the same chart. We
20 changed the title because the takeaway from that chart is going
21 to be different. It now says -- it's now communicating the
22 takeaway that SCOR didn't achieve or return to an A rating
23 across the board until November 20, 2006. The reason that's
24 important and we know it from reading the expert reports is
25 that they didn't want to do anything at that time that would

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1 cause those ratings would be downgraded again.

2 And so the yellow, if you go to the next one, DEM 85,
3 that's the relevant time period that are the settlement
4 negotiations. So you can see why they weren't going to
5 increase their reserves, because they knew that doing that
6 would endanger their economic recovery or at least the
7 perception of their economic recovery in the market.

8 Q. If the client, the lawyers called and said, I want you to
9 change the title to green, what was the consultant at Visualex
10 supposed to do?

11 A. We would say, first of all, it's color coded and anything
12 with SCOR we have color coded red, and the reason we do that is
13 because it is going to evoke something bad happened. That's
14 the feeling we want the jury to have when they look at this, or
15 in this case the arbitration panel. And we don't have green in
16 the case and all of a sudden to throw up an exhibit that has a
17 green title would not fit in with the overall visual strategy.

18 Q. Would it have made a difference if the client told you that
19 they wanted the various lines to be broken up in dots?

20 A. Yes. I don't think it would have shown the trend and,
21 again, that's what we are saying as the experts here. If you
22 are trying to show a trend, which is what my understanding is,
23 what the takeaway is, that would not be the best way. In
24 response to that conversation, the attorney may say, well,
25 that's what I told -- that's what we wanted to do originally,

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1 but now we found this other information and we don't think we
2 want to show the trend. It's a constant iteration process,
3 whereas the consultant you are saying, tell me your concerns
4 about this, tell me why you don't think it does what it's
5 supposed to do, and then they give you more information and
6 then you say, well, in light of that, we are going to change it
7 this way or, in light of that, we still recommend that this is
8 the best presentation.

9 MS. KLEIN: Your Honor, I move to have G3 admitted.

10 THE COURT: Is there an objection?

11 MR. RISK: I think I made the objection and your Honor
12 admitted.

13 THE COURT: I think so, too. G3 was received.

14 (Defendant's Exhibit G3 received in evidence)

15 Q. Ms. Romano, is the job of the graphic consultant during Ms.
16 Kadden's employment the same as a production coordinator?

17 A. No.

18 Q. Can you explain to us what is the different
19 responsibilities?

20 A. Production coordinator is just that. They are just
21 coordinating the production. So they are basically just
22 trafficking the exhibits around the studio because there is a
23 fairly elaborate process that's followed to create every
24 exhibit. And the production coordinator is just tracking that
25 layout around the office. And then the production coordinator

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1 is also the one -- the consultant when you put anything into
2 this the studio basically says, okay, these exhibits have to be
3 out by this time for these people, and the production
4 coordinator is tracking to make sure that it's getting done and
5 then assembling the presentation to actually then get to the
6 client for their review.

7 Q. When the consultants are working on a case, do they manage
8 the production coordinator?

9 A. Yes.

10 Q. Do they have the authority to tell the production manager
11 when to report to work?

12 A. Yes. There are times when you have to come in earlier or
13 stay late, yes.

14 Q. And do they tell them when to leave?

15 A. They tell them, yes, when they are able to leave if there
16 are deadlines that need to be met.

17 Q. Not from a legal perspective, but from Visualex's
18 perspective, do you group the different job titles you talked
19 about into different categories?

20 A. Yes.

21 Q. What are those categories?

22 A. We have a professional staff, which are basically the
23 people that are determining what needs to be done and when it
24 needs to be done, and that's the consultants and also to some
25 degree the art directors. So there is a hierarchy that

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1 consultants basically explain to the art director what needs to
2 be done. And then the art director then hands out various
3 exhibits and explains to the designers from an aesthetic
4 standpoint that needs to be done and also communicates to the
5 designers as well what the takeaway that he's been told has to
6 be achieved, as was briefed by the consultant.

7 Q. Is the production coordinator considered to be part of the
8 professional staff?

9 A. No.

10 Q. Does the production coordinator receive overtime?

11 A. Yes.

12 Q. What is the specific job of the graphic designers?

13 A. The graphic designers actually just create the layout in
14 one of the software programs. The Adobe Suite software is what
15 we use.

16 Q. So are they responsible for the actual physical creation?

17 A. They are executing -- yes, they are executing on two
18 levels. They are executing what they have been told the best
19 way to achieve the takeaway is, and they are executing
20 specifically what the art director has put in place as far as
21 what type of layout to use, whether the title band should be
22 across the top or if it should be on the side, those kinds of
23 things.

24 Q. Are the graphic designers considered part of the
25 professional staff?

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1 A. No.

2 Q. Why not?

3 A. Because they just do what they are told to do. They don't
4 get to tell anybody what to do.

5 Q. And do you have a bookkeeper?

6 A. Yes.

7 Q. And is she considered part of the professional staff?

8 A. No.

9 Q. And why not?

10 A. Again, she is just basically taking information that people
11 enter and just running various reports and using it to generate
12 payroll or taxes or whatever. She doesn't get to -- the
13 information she is working is the information. She doesn't get
14 to change it, judge it, do whatever. She just presses a button
15 to get the software to print out the reports necessary to run a
16 business.

17 Q. Are the graphic consultants considered part of the
18 professional staff?

19 A. Yes.

20 Q. And have they always been part of the professional staff?

21 A. Yes.

22 Q. And can you explain why?

23 A. Because they are the ones who are directing what needs to
24 be done on a daily basis and are assembling the team within
25 Visualex to actually meet the deadlines and deliver what our

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1 clients are hiring us to deliver.

2 Q. Are the same deliverables that you talked about ever
3 recycled and used again in another case?

4 A. Not without changes. Sometimes the same concepts are used
5 from one case to the next, but you can never use a graphic as
6 is with no changes. Every case is different. So you always
7 have to alter for fact patterns.

8 Q. Did Ms. Kadden during her employment work on any cases
9 other than Wells Fargo and SCOR?

10 A. Yes.

11 Q. And can you tell me on how many cases did she work as a
12 consultant?

13 A. I couldn't -- a lot. A lot. Any case that was in the --
14 there is no -- we are a pretty small office. Everybody is
15 working on everything. Everybody knows what's going on.
16 That's why we have 4:00 production meetings every night, so
17 everybody knows what's going on. She worked on every case.

18 Q. Do the graphic consultants do any marketing?

19 A. Yes.

20 Q. And is marketing part of their job?

21 A. It's part of the job. Obviously, you want to always have
22 more potential clients out there, but it's certainly not a
23 primary responsibility. Any marketing activities are only done
24 when there is no case work.

25 Q. Are you familiar with the phrase primary contact?

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1 A. Yes.

2 Q. And what does that mean in Visualex's business?

3 A. Basically, it's just an easy way for attorneys to know who
4 to call, who to ask for when they call the office if they need
5 to get something done.

6 Q. And does Visualex use the nomenclature of lead consultant?

7 A. Sometimes, yeah.

8 Q. Explain to me the different job between the lead consultant
9 and the nonlead.

10 A. I mean, honestly, there is no difference in the job. It's
11 just the mouthpiece. Someone needs to communicate to the
12 client what we have decided is the best way to present
13 something or communicate whether we don't agree with what they
14 are asking us to do or if they have suggestions of what needs
15 to be done. It's basically the person who is the face. It's
16 kind of like a partner on a case. You don't call a 200-person
17 law firm and just say, hi, I'm Joe Shmoe and just expect
18 everybody -- you have a person to ask for.

19 Q. And can you explain to us the process during Ms. Kadden's
20 employment of how it was if there was a particular case that
21 the consultants would work together in coming up with the
22 visual strategy, internally, how it worked?

23 A. When the background information came in, everybody -- at
24 least two, but in most cases all three of us would review the
25 information. I made a business decision in many cases not to

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1 bill for all three people. I never billed for all three people
2 reading it. First of all, the clients would push back on that.
3 But it's a business decision that I wanted to be able to
4 represent that when you hire Visualex you hire a company where
5 everybody is smart on your case. And when documentation would
6 come in, we have a folder that's called public on the server
7 and it would go into that folder under the case number so that
8 all of the consultants had access to that information to be
9 able to read it. And also if they wanted to go back and look
10 at something or need to pull information from that that it was
11 accessible to all of us.

12 Q. During this time did Ms. Kadden work on cases commonly
13 referred to as CSX?

14 A. Yes.

15 Q. What is CSX?

16 A. CSX is the railroad.

17 Q. Can you explain what Ms. Kadden did in connection with CSX
18 as a consultant?

19 A. CSX is a large client of Visualex and over the years they
20 have waves of different types of litigation. So, basically,
21 what happens is that, you know, plaintiff lawyers say, hey, we
22 work for the railroad and do you have hearing loss, then you
23 have all these hearing loss claims. You try a couple of them,
24 you get a few defense verdicts and they say, we are not
25 recovering under that. Do you have carpal tunnel syndrome when

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1 you are fixing the locomotives, you can get carpal tunnel and
2 you have that wave. There are these waves of litigation that
3 we do for CSX.

4 The current waves are solvent litigation, that you're
5 exposed to solvents, allegedly called toxic brain
6 encephalopathy from cleaning the locomotives and also ballast
7 cases. Walking on ballasts gives osteoarthritis.

8 Whenever we get these cases, we have to read the
9 depositions of the medical doctors and the workers to try to
10 come up with graphics that are going to advance the position of
11 the railroad, which is that we were not responsible.

12 Q. And did Ms. Kadden work on these CSX cases?

13 A. Yes.

14 Q. Did she work on the advice strategy of them?

15 A. Yes.

16 Q. And did she create demonstrative exhibits that were
17 ultimately delivered to the clients?

18 A. Yes.

19 Q. Were there any cases that you recall, as you sit here
20 today, whether or not Ms. Kadden was identified as the primary
21 contact?

22 A. Yes.

23 Q. And what cases were those?

24 A. There were a couple of them. Sobieski case, the Derea
25 case, the Mirror World case at a certain juncture.

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1 THE COURT: Which one?

2 THE WITNESS: Mirror World.

3 THE COURT: Two words?

4 THE WITNESS: Yeah. Mirror World. It was a patent
5 case against Apple.

6 Q. Can you tell us about some of the patent work that the
7 consultants work on?

8 A. Tell you --

9 Q. For example --

10 A. Yes.

11 Q. What was Visualex retained for in connection with Mirror
12 World?

13 A. The Mirror World case is actually a really interesting
14 case. David Gelertner had these patents. On some of the
15 things, like the cover flow thing that Apple has right now
16 where you can scroll through and then the page that you're
17 looking at highlights large, and then also this automatic
18 archiving software. There was a spotlight type of thing.
19 Apple was practicing this on their iPods, their iPads, their
20 MacBooks, and we represented the inventor, Gelertner, who had
21 these three patents on these technologies that Apple was
22 accused of infringing.

23 MS. KLEIN: Your Honor, what time does the Court break
24 for lunch?

25 THE COURT: 1:00.

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Romano - direct

1 MS. KLEIN: At 1:00?

2 THE COURT: Yes.

3 MS. KLEIN: Since it's 4 minutes to one, is it okay to
4 take a break right now?

5 THE COURT: Why do we do that?

6 MS. KLEIN: I was going to start another line of
7 questioning.

8 THE COURT: Start it. It's a nonjury trial.

9 MS. KLEIN: I would like to hand the witness select
10 parts of Exhibits I and J, and this is one of the ones that was
11 huge and we did compile that. So I have a copy for everybody.

12 Q. Ms. Romano, are you familiar with this group of documents?

13 A. Yes.

14 Q. And can you tell us what this is?

15 A. This is information that is related to an exhibit from the
16 Sobieski case.

17 Q. Who were the consultants that worked on this case?

18 A. I think at some point it was all three of us, but it was
19 predominantly Adina.

20 Q. And looking at these documents, how can you tell that Ms.
21 Kadden worked on this document? Was the consultant working on
22 this case?

23 A. I can tell her handwriting.

24 THE COURT: Doesn't she agree she worked on these,
25 Mr. Risk, when you look through them?

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Romano - direct

1 MR. RISK: She was involved in the Sobieski case and
2 her initials are on one or more of these documents.

3 THE COURT: And her handwriting?

4 MR. RISK: Somewhere, yes.

5 THE COURT: She can look through it and tell whether
6 her handwriting and initials were there?

7 MS. KADDEN: Yes.

8 THE COURT: Some?

9 MS. KADDEN: Yes.

10 MS. KLEIN: Your Honor, I move to have this admitted.

11 THE COURT: Yes. All right.

12 MS. KLEIN: Just for ease of convenience, should we do
13 it as a new number because it's parts of I and J?

14 THE COURT: You called it I and J1. That's the new
15 number.

16 MS. KLEIN: But it's not all I and J1.

17 THE COURT: I and J1 is the big one?

18 MS. KLEIN: J1 is the huge one. This has two pages.
19 The way that the graphics are maintained at Visualex's normal
20 course of business is the graphics and how it's produced and
21 all the work of the consultants, their recommendations are in
22 one thing called an envelope folder, and e-mail written
23 communications about the consulting are separate. So in order
24 that one can see the particular things, we have put them
25 together.

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1 THE COURT: Why don't you call it I and J1 excerpt?

2 MS. KLEIN: Good. That's perfect. Thank you.

3 THE COURT: I and J1 excerpt is received.

4 MR. RISK: No objection.

5 (Defendant's Exhibit I and J1 excerpt received in
6 evidence)

7 MS. KLEIN: Your Honor, I'd like to show the witness
8 another excerpt of it, if I may approach. The front page of
9 this is VIS 747.

10 Q. Do you recognize this document?

11 A. Yes.

12 Q. And can you tell us what this is?

13 A. It's an e-mail string between Adina and an attorney from
14 Stroock working on the Sobieski matter.

15 Q. In reviewing this document, can you tell whether or not Ms.
16 Kadden was acting in a consulting capacity?

17 A. Yes.

18 Q. Can you explain to us what she was doing in connection with
19 this?

20 A. Well, she is evaluating the request by the client. If you
21 look down at the bottom, which is the first e-mail from Bill
22 Seymour, he is asking, can we make sure that the small circle
23 is 1 percent by area the size of the larger circle, which,
24 again, if she was a wrist, the answer to that would be
25 unequivocally yes. But because she is a consultant, what she

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Romano - direct

1 actually is telling him is that, it's actually -- it's 75
2 percent of 1 percent, as the label says less than 1 percent.
3 Do you want the size changed to 1 percent or remove the less
4 than text? She is basically saying what you are asking doesn't
5 make sense because she is evaluating that information and
6 saying, well, if the label says less than 1 percent and we are
7 showing it as 1 percent, then that would be -- it would be
8 confusing to a jury. So she is basically alerting the attorney
9 to the fact that what he's asking for doesn't make sense.

10 Q. In connection with this exhibit that you're looking at in
11 this e-mail, did that ultimately become a demonstrative
12 exhibit?

13 A. I'm sorry. Can you say that again?

14 Q. Yes. Did the work that Ms. Kadden is talking about in this
15 e-mail ultimately become a graphic?

16 A. Yes.

17 Q. Is the graphic in the package?

18 A. Yes.

19 Q. And can you tell me whether or not her advice was followed?

20 A. Yes. If you look at VIS 1215, it looks like her advice was
21 followed.

22 MS. KLEIN: Your Honor, I move to have this admitted
23 also as the summary and it's J5 and I, summary 2.

24 MR. RISK: I have no objection. It's not a summary.

25 THE COURT: Excerpt. Excerpt 2.

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1 Now we managed to run the clock until 1:00. We will
2 take our luncheon recess now until 10 after 2.

3 (Luncheon recess)

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AFTERNOON SESSION

2:15 p.m.

MS. KLEIN: Your Honor, may we approach the side bar with you?

THE COURT: It can't be done in open court?

MS. KLEIN: It can be. Just in trying to figure out how to best sort of expedite this and not waste everyone's time, one of the possible options that I thought would work is, the long time period is going to be going through her time sheets, adjustments, things like that.

THE COURT: Which you keep pointing out won't be necessary, depending on these economics and the decision.

MS. KLEIN: One of the things I was wondering, is it possible or feasible for the Court that we take all of the testimony relating to obviously the position, what she did, things like that, possibly the good-faith issue, so we wouldn't have to call any witnesses back in regards to that.

Ms. Kadden has testified at her deposition that her handwritten notes were accurate. The time sheets are her entries that she put in. And it's really mechanical of going through. I would be just as happy, if the Court would so indulge, if and when you issue your ruling --

THE COURT: On exempt, nonexempt?

MS. KLEIN: Yes. Based on that ruling, if you find it exempted, it doesn't matter what time she comes. She was free

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1 to do what she did. In the event that you find that she is
2 nonexempted before we close the official sort of record, if the
3 parties could then maybe on submission -- it's numbers and it's
4 going through -- I'm happy to have Ms. Kadden, we will read in
5 the testimony about her handwritten notes.

6 THE COURT: It's okay with me if it's okay with
7 Mr. Risk.

8 MR. RISK: The time sheets are the time sheets, as far
9 as we are concerned. These handwritten notes are nowhere in
10 the record for this trial, so an examination comparing
11 handwritten notes that are not exhibits with official time
12 sheets that are. I don't care how the Court wants to do it,
13 but I think those handwritten notes are out of play.

14 MS. KLEIN: You produced them. They are hers. She
15 maintained them in this case and she said that they were
16 accurate and they are reflected as to what she did. If it says
17 arrived 9:35, leave 6:00, I don't know how she can dispute
18 that.

19 MR. RISK: Your Honor's pretrial order says in the
20 strongest terms that that exhibit list is final and we have
21 operated that way. And those handwritten notes are nowhere in
22 the record for this trial right now.

23 MS. KLEIN: I can use them for impeachment to cross
24 her. Again, she testified at her deposition that they are
25 accurate.

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1 THE COURT: They are an admission of a party. I don't
2 see any problem with using them. They are a party admission.
3 She already acknowledged that at her deposition.

4 MR. RISK: We think the time sheets are the official
5 record and we are fighting over nickels and dimes, but we will
6 do it in the way that the Court wants to do it, fine.

7 MS. KLEIN: The problem with the time records is, Ms.
8 Kadden already testified that, no matter what, they accounted
9 in the time system for eight hours. So even if you came in at
10 2, she would write two hours general, which meant she didn't
11 come in until 10. Again, what shows that is her handwritten
12 record when she wrote the day, contemporaneous notes, arrived,
13 left early.

14 THE COURT: What are these notes written on, on a
15 calendar?

16 MR. RISK: Your Honor, she wrote handwritten notes,
17 which were the basis for then what she entered on the computer.
18 Ms. Klein is going to spend apparently a lot of our time
19 comparing the handwritten notes to the computer entries and
20 when the time comes she will testify about it.

21 THE COURT: Whatever.

22 Let's use our time remaining today. Let's keep going.

23 MS. KLEIN: I guess I wanted to know how much to cover
24 with Ms. Romano, whether we should start going over on her time
25 sheets the comp she was paid.

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1 THE COURT: No.

2 MS. KLEIN: We will submit that after?

3 THE COURT: Yes.

4 MS. KLEIN: Thank you, your Honor.

5 Just so I am clear on the record, we are going to put
6 in all the information that shows relevance towards just
7 strictly the exemption/nonexemption and not damages. Is that
8 correct for now?

9 THE COURT: No. You said you were going to cover the
10 good faith.

11 MS. KLEIN: Good faith, because it's not numbers,
12 correct.

13 BY MS. KLEIN:

14 Q. Ms. Romano, do you still have what we marked as Exhibit
15 IJ1 --

16 A. Yes.

17 Q. -- in front of you, the excerpt. I would like you to look
18 at the one because they look alike. They are similar. The
19 front page is the one that bears VIS 01103?

20 A. Yes.

21 THE COURT: I have it.

22 Q. Can you explain to us what is going on in this group of
23 documents in regards to this demonstrative exhibit that was
24 produced for the plaintiff?

25 A. This is basically a collection of the materials that are in

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1 an exhibit envelope and also along with some communications
2 from the client, and it's a good representation of how an
3 exhibit evolves kind of from start to finish.

4 Q. Can you take us through how it evolves?

5 A. Yeah. Obviously, the first thing that you do is, you are
6 reading background materials, and sometimes you have a
7 conversation with the client, sometimes not. That depends on
8 the circumstance.

9 But when the client decides, yes, we want to go
10 forward with a particular exhibit that you had recommended,
11 they didn't have to provide the actual content information that
12 has to be utilized in developing the graphic. So this first
13 page is basically the trial team sending us the names and the
14 dates of the predecessors of Sobieski that is going to be
15 utilized to start the creation of the graphic.

16 And so what the consultant does is receives the
17 information and sometimes it's what you expected. They say,
18 I'll send you the names and you have an idea in your head.
19 Sometimes it's what you expected to receive and sometimes it's
20 not. If it's not, then, again, there is a communication with
21 the client saying, hey, you know, we talked about doing this
22 flow chart and what you sent me really doesn't make sense to do
23 that. Sometimes at that point it changes into something else,
24 but if it's what you requested from the client, then the next
25 step is, if you go to VIS 1105 and 1104, if you could put those

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1 side by side, because it was actually too big to put on a
2 portrait one, so it's two pieces.

3 This is a form that the consultant fills out when
4 putting -- before anything gets put into the studio. It's
5 called a chart type form. And what the consultant is doing is,
6 you know, it's identifying the case number because a lot of
7 times we have multiple cases in the studio at the same time,
8 giving it an exhibit number. This is the first exhibit created
9 for this case. Also identifying when you think it's going to
10 be used. This particular one was at this point being created
11 for use in opening.

12 And then the next thing is to craft the title, which
13 obviously is a really important thing. This one is not earth
14 shattering, but many of them are, as far as giving the
15 takeaway. And the information that was in that e-mail, the
16 party names and the dates, then is communicated to the studio,
17 that the consultant feels the best way to portray this is kind
18 of a flow chart with dates up at the top, names of the
19 companies at the next level. And if there are pictures of the
20 liquor that was actually being created -- sold by these
21 companies, it was going to be in there.

22 Just to back up one second, this -- the allegation in
23 this case is that Sobieski, who is our client, misappropriated
24 the name Krupnik when they were selling their honey liquor, and
25 they used this other trademarked -- I think it's German name.

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1 Our point is, it wasn't us, basically, and that we did not
2 misappropriate their trademark. It was -- actually got out on
3 the Internet and ended up on our website and we weren't
4 responsible for it. Anyway, we were going to put pictures. We
5 were recommending that the best thing to do is to put pictures
6 of the various types of honey liquor within each box that goes
7 with the predecessor.

8 So what happens at this point is, again, the
9 consultant is generating all this information. The back of
10 that sheet, it's actually like a carbon paper, but it's really
11 not carbon paper. It's called the yellow sheet. What you
12 write on it goes through to the back. That gets given to the
13 production coordinator so he can keep track of every exhibit in
14 the case and generate what's called a client status report so
15 that everybody always knows how many graphics and what graphics
16 are in the studio for a given case.

17 And then the next thing that consultant does is takes
18 this envelope, and the pictures would have been in there as
19 well, that they are going to use, as far as using for the
20 images of the bottles, and then they would have what's called a
21 briefing session with the art director who is assigned to the
22 case. And in the briefing session, basically, the consultant
23 is explaining to the art director not only the overall
24 strategy, visual strategy of the case, but how this exhibit
25 fits in and what the takeaway from this exhibit needs to be and

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1 also explains where the information that we say, we have
2 bottles of the images in the file on the server. So they have
3 a good understanding of what needs to be communicated by the
4 layout.

5 And so, basically, then the art director goes back and
6 either he creates the layout or he directs the designers to
7 create the layout the way he wants it to be created. For
8 example, there is a grid. Every exhibit has a grid. So titles
9 don't jump around when you scroll from one to the other. So
10 those kinds of things he is telling them what typeface to use.
11 Those kinds of things.

12 So what then happens is the designer or the art
13 director, I guess -- just globally I'll call them the studio --
14 generates a layout, which is VIS 1100, and you will be able to
15 see from that that the layout actually looks pretty much the
16 way the consultant had requested it.

17 And so what happens, and I should back up because this
18 is a really important part of the whole process, is so if the
19 designer creates it, it goes back to the art director. There
20 is a pretty elaborate proofing process in place because we
21 don't want any mistakes to get out of our office to the
22 clients. And so the first thing, part of the proofing process
23 is the designer who creates it is obviously proofing their own
24 work to make sure that they did everything they were told to
25 do, and then they pass it on to the art director. And the art

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1 director is looking at it from an aesthetic standpoint. Did
2 they snap to the grid? Did they put the title on the right
3 spot? Did they use, you know, franklin gothic and not
4 helvetica, all these kinds of things he is looking for from
5 that standpoint.

6 It then goes to the production coordinator because the
7 production coordinator has a list that's generated from the
8 consultant of all the things that need to go out in this
9 presentation. When it comes to the production coordinator, he
10 checks it off, says okay it's done, and he is proofing for just
11 blatant errors. Is something misspelled? Is the word that the
12 consultant put on this page, is it on this graphic? It's
13 actually pretty comical because sometimes if the consultant
14 misspells a word, the production coordinator will sign off on
15 it, concedes it's spelled wrong, so we are going to spell
16 concedes wrong.

17 Then he brings it to the consultants. The consultants
18 are proofing for a very different purpose. The consultants are
19 evaluating the layout for the takeaway. Does it do what it's
20 supposed to do, A? And, B, if the answer to that is yes, is
21 there anything that we can do to make us work harder, to help
22 the client communicate their point and ultimately win the case?
23 If the consultants all agree, yes, this is great, then we send
24 the file, we tell the production coordinator, okay, it's good,
25 he puts it in Power Point and he sends it to the client for

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1 review.

2 What then happens is, once the attorneys see it, they
3 may have additional changes that they want to have done because
4 once they see it on paper they realize, oh, jeez, it doesn't
5 communicate this other point that we have to make, and so they
6 will communicate to us what changes they want to have made. If
7 you look at VIS 1102, this is information that the client is
8 sending us and, lo and behold, the client says, hey, I told you
9 there was this one thing happening, but there was also this
10 licensing agreement which is an important issue in the case and
11 we would like to add that.

12 Obviously, there is a lot more information on this
13 chart than there was on the one that we previously created. As
14 a consultant you say, okay, can I work this into the layout
15 that was created the first time? And if the answer to that is
16 no, I can't squish it there. Then you have to completely
17 reevaluate your approach and say, okay, well, was the flow
18 chart type of approach the way to go? And the answer is,
19 obviously, this won't work. As a flow chart there is too much
20 on there.

21 Q. Ms. Romano, when you said whether or not you could smush it
22 onto the flow chart, physically, could it be done that this
23 stuff would go on it?

24 A. It could, but it wouldn't be very effective. Everything
25 would get much smaller and you are not going to be able to do

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1 the comparison between these two events running at the same
2 time.

3 So what the consultant then does is he communicates
4 with the client and says, obviously, there is new information
5 on this now that we need to include. We can't fit it the way
6 it's currently designed. Tell us why this is important so we
7 can recraft this, reevaluate our approach to do something that
8 is going to work harder to communicate the point you are trying
9 to communicate. And you can see what you do once you come up
10 with the new approach, you pull that exhibit envelope and there
11 is a tissue paper over the top, it's called flapping. And
12 that's the way that you write things on there to communicate to
13 the studio what changes need to be made. If you look at VIS
14 1099, you can see that we are actually writing the revisions on
15 there that need to be made to this.

16 And so the process starts all over again. If the
17 designer is creating the layout, it goes back to the art
18 director, the art director is proofing for aesthetic reasons,
19 aesthetic things, then it goes back to the production
20 coordinator, who checks it off, based on the sheet, it's called
21 the conference report that the consultant generates, indicating
22 that this needs to be revised and resent.

23 And then it goes back to the consultants who are
24 saying, okay, A, did the changes I asked to be made, were they
25 made and, B, even though I asked them to do it this way, does

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1 it work? If the answer to that is no, then you say, I think
2 there is a better way to do this and it goes back into the
3 studio again and you go back to the art director and you say,
4 you know what, it's just not working hard enough. It's just
5 not doing what it's supposed to do. I think maybe we should
6 try something else.

7 And so you can see, the next one, 1098, is the art
8 director does what he is told to do by the consultant. But
9 then if you look at 1097, the consultant is not happy with it.
10 It's not -- it's not working hard enough. And so you can see
11 all of the markings on it. The text could be larger, you need
12 to be able to read it.

13 And then why are we, all of a sudden, introducing a
14 new color? Is that helping us or hurt us? Is it making it
15 more confusing? Don't change the color. The color on the top
16 of the flag shouldn't be gray. It should be blue. It should
17 give ownership that this is the -- our client that we are
18 talking about. Goes back into the studio, process starts all
19 over again. The studio generates another draft, VIS 1095, goes
20 back through the proofing process again, the consultants are
21 still not happy with it. It's still too small. And there is
22 all this extra space up at the top being used for the title
23 band. Lose the title bands. Lift up the flags. Make the text
24 larger. It's got to be easier to read. If we are going to
25 send this to our client, it's not going to work hard enough to

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1 help them communicate their case. It goes back into the studio
2 again. The studio generates another layout, which is VIS 1101.

3 Q. Ms. Romano, who are the consultants that are working on
4 this particular exhibit that we are looking at?

5 A. It's my initials and Adina's initials. And, obviously,
6 that's the other thing. At the proofing process, everybody who
7 looks at it signs it. So if a mistake gets to the client, you
8 know how to -- basically, you have to work a little bit harder,
9 you signed off on it and there is a mistake in it. But the two
10 consultants that are signing off on this is Adina and myself.
11 And there is some, towards the end here that it's just Adina.
12 It's not even my initials. That happens when people get pulled
13 onto different things. For example, on 1095, VIS 1095, it's
14 Abdul's initials and Adina's initials, not mine.

15 Anyway, once the layout is approved internally, all of
16 the consultants and the art director feel that it is the best
17 that we can do to communicate the point that the clients need
18 to communicate in order to persuade the trier of fact about
19 this argument, we then let the production coordinator know,
20 yes, it's good, it goes to the Power Point file and it gets
21 posted to the client for review.

22 Then the client, if you look at VIS 1101, the client
23 makes additional changes. Again, the consultants are always
24 evaluating every single change that comes in that is requested
25 by the client, does it help or hurt the takeaway. Does it help

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1 the exhibit communicate what it needs to communicate, or does
2 it hurt it? Can we keep it within this format or do we have to
3 find a different approach? If we have to find a different
4 approach, again, it's up to the consultant to decide how to
5 manage the expectations of the clients. You want to make sure
6 that they understand why you are doing what you are doing. So
7 sometimes it can be a complete deviation from what they had
8 seen before. You want to prime them for that so they don't
9 open it up and say, oh, my God, what did you do. You want to
10 say, okay, by adding this information, all the text is going to
11 be small and you are not going to be able to read it, so we
12 recommend we are going to do this, would you like us to try it.
13 At that point they usually say yes or they say, yes, do it your
14 way, and can we see it our way, too, so we can see which works
15 better.

16 Once the consultant has a plan for how they are going
17 to change the exhibit so that it can accommodate the requested
18 changes, writes it on the tissue again, goes back through the
19 whole process again, that's VIS 1093, you can see that Adina is
20 making notes. She adds the title collectively Sobieski. She
21 is changing things to all caps. She is also directing the
22 studio to modify the images a little bit for the coloring,
23 because the coloring of the liquor in the bottle had a
24 strategic importance. And then this, again, I am not going to
25 beat a dead horse, it keeps going through the process until the

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1 consultants agree that it communicates what the clients need to
2 communicate.

3 And then it is, again, sent to the client for review.
4 The client then -- you can see, we communicate with clients in
5 different ways. Sometimes for the really complicated revisions
6 they actually call us because it's a lot more efficient than
7 trying to memorialize something in an e-mail, or sometimes they
8 really can't even articulate what they want. They can tell you
9 what they don't like about it, but they can't articulate what
10 they want. That's usually a phone call. Or they send you with
11 a PDF with markups, or on VIS 676, they send you an e-mail that
12 kind of explains what they want.

13 On this one, whenever you have questions, concerns
14 with the client, again, it's your job as the consultant to
15 manage the expectations. You never just blindly follow. If
16 you have questions, concerns, recommendations, you always let
17 them know. You can see at the bottom Adina is saying. Hi,
18 Matt, please give me a call on my cell phone. Obviously, there
19 is something in this e-mail that she has concerns about that
20 she doesn't understand that she wants to make recommendations
21 about. It's really literally a chess game. Every move you
22 make may cause the client to make a different move and the
23 process never stops until the final file is delivered, and even
24 sometimes it doesn't stop then when you had to e-mail a tech in
25 the courtroom a change. Until it goes up on the screen, it's a

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1 complete iterative process and at every step of the way the
2 consultant is making recommendations as the best way to
3 communicate the information.

4 Q. Thank you.

5 MS. KLEIN: I'd like to hand the witness what we will
6 mark as excerpt 3. It's also selections from Exhibit J through
7 3. It will be a much shorter thing.

8 THE COURT: I don't think I need more of this to
9 understand the process. I think you are wasting my time now.
10 I have got this. I told you I got this. This is a matter of
11 legal determination now. I know what the person does.

12 MS. KLEIN: I believe that Mr. Risk, based on what we
13 said right before we went on break, was suggesting that Ms.
14 Kadden did not do this work. And, again --

15 THE COURT: I think you shouldn't anticipate what he
16 is saying. Her signature is on it. Her notes are on it. She
17 will testify to it herself. If there is a direct conflict and
18 she says, I didn't do all those things that Ms. Romano said,
19 that's what she will say under oath. It's unlikely since her
20 signature is all over it and her handwriting. Sounds like it's
21 her job.

22 MS. KLEIN: Your Honor, if I can have two minutes and
23 one short one and I'll be done because what you've indicated.

24 THE COURT: All right.

25 MS. KLEIN: I would like to hand the witness excerpt

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1 3.

2 THE COURT: Excerpt 3 is all e-mails.

3 Q. Ms. Romano, please take a look through what is marked VIS
4 00702, 701, 700, 699, and 698, and 697.

5 Can you just take a quick look at this and tell me
6 whether or not you recognize this document?

7 A. Yes.

8 Q. And as this a document that was kept in the ordinary course
9 of Visualex's business?

10 A. Yes.

11 Q. Can you tell us what this document is?

12 A. It's an e-mail string that's communications between
13 Visualex consultants. Specifically, most of these look like
14 they are going back and forth between Adina and the trial team
15 at Stroock that's working on the Sobieski case.

16 MS. KLEIN: Your Honor, I would like to move this into
17 evidence.

18 THE COURT: I can't imagine any objection. These are
19 communications from Ms. Kadden.

20 MR. RISK: We have no objection. They are not a
21 business record. But we have no objection.

22 THE COURT: I agree. They are the state of a party
23 opponent.

24 Q. Ms. Romano, in looking at these can you please tell me
25 whether or not Ms. Kadden was acting in her role as a

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1 consultant?

2 A. Yes.

3 Q. Can you tell us what in these documents allows you to
4 conclude that?

5 A. Well, on VIS 700, Bill Seymour sends an e-mail that says:
6 Hi, Adina, can we put a shipping container in the last picture
7 on a truck? And as a consultant, as she is supposed to do, she
8 is evaluating whether or not the answer to that is yes. Can
9 we? Absolutely. Can we? Is it the right thing to do? As a
10 consultant, obviously, she does not recommend it. And she
11 explains why, which is her job to explain why she doesn't
12 recommend it. It doesn't look like the distributor icon on
13 graphic 5, and we also have the shipping container box on the
14 left side. I would not want to put that one on the truck
15 because it will be the same as a distributor box. Of course,
16 all distributing container boxes should have the same icon to
17 reinforce the imagery. What she is basically saying to the
18 client, sure, we can do it, but we don't recommend it because
19 you are using the same icons for two different things, which
20 could be quite confusing.

21 Q. Same imagery or icon?

22 A. Imagery, icon. It's the same thing.

23 Q. Is this excerpt 3 that's been admitted into evidence
24 typical of the work that Ms. Kadden did throughout the entirety
25 of her employment?

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1 A. Yes.

2 MR. RISK: Objection. Leading.

3 THE COURT: Overruled.

4 A. Then, as I was explaining, it is like a chess game. If you
5 look at VIS 701, the attorney responds and basically agrees
6 with this suggestion and then explains what he says is, he is
7 giving more information. We are actually saying that these two
8 steps do perform the same function, but from a different
9 perspective. So they are collaborating on well, okay, I
10 understand what you are telling me, that you don't want to
11 confuse the jury by using the same thing for two -- the same
12 imagery for two different things, but he is then saying, okay,
13 I understand that, but it actually sort of is the same
14 function. They are working together to come up with, based on
15 her advice, her coming up with what makes the most sense for
16 them and to communicate their takeaway as effectively as
17 possible.

18 Q. Thank you, Ms. Romano.

19 Within the Visualex offices during the time that Ms.
20 Kadden worked there, was there a time keeping system?

21 A. Yes.

22 Q. Let me rephrase that. Was there a manner for employees to
23 keep track of what they were doing?

24 A. Yes.

25 Q. Do you know the name of the system that is used?

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1 A. It's QuickBooks.

2 Q. Can you just explain to us very simply the process of how
3 the employees keep track of their time?

4 A. Basically, when you are working -- you have task codes that
5 you choose, so if you are working on a case you pick the case
6 name so that time, if it's billable, can be billed to the
7 correct case number. Then you pick a task code of what you are
8 doing and there is several different ones. You can be
9 consulting, you can be project management, depending on what
10 you were doing. Then you write a description explaining what
11 you were doing and then you put the amount of time. We bill in
12 six-minute increments. So six minutes is equal to .1. So you
13 basically put in the amount of time that you were spending
14 doing that task.

15 Q. And are there, in the QuickBooks, different time rates for
16 the same item of book? For example, is there an overtime rate
17 and a day rate?

18 A. In QuickBooks?

19 Q. Um-hum.

20 A. Yes.

21 Q. What is that for?

22 A. That is -- it's an internal tracking of how much it's
23 actually costing us to -- it's just an internal tracking of
24 whether we are going to work extra hours on cases.

25 Q. And is the overtime rate that's indicated on those

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1 indicative of the fact that a client will absolutely pay an
2 additional fee?

3 A. No.

4 Q. Can you explain that?

5 A. Because what happens a lot of times is that there are
6 multiple cases in the studio at the same time. And because of
7 that, something slipped past 6:00 and people are working late
8 to meet all the deadlines, but it's not the client's fault so
9 that we don't charge them overtime for it.

10 Q. And, yet, would an employee put that rate in?

11 A. No. They shouldn't.

12 Q. They should not?

13 A. They should not.

14 Q. Is there anything in QuickBooks that would accurately
15 reflect an employee taking client revisions?

16 A. Yes. But it depends on -- when you say taking client
17 revisions, taking them from whom? There is different things.
18 A consultant would put that down as consulting time because
19 they are actually reacting to client requests and evaluating
20 whether or not that makes sense. But the designers have to
21 execute the revisions that the consultants decide to do. The
22 designers have to execute that and they would put that down.
23 They would put it actually under the task client revisions
24 where the client would put it down under consulting.

25 Q. If the consultant was not acting in a consulting role, what

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1 would he put it as?

2 A. Why would a consultant not be acting in a consulting role?

3 Q. Are there any circumstances or times where they are not
4 working as a consultant?

5 A. When they are working on case work?

6 Q. Uh-huh.

7 A. I mean, you're always a consultant. You don't put on a
8 consultant hat or not a consultant hat. There are certain
9 tasks that you perform as a consultant which you don't want to
10 charge the client a high rate for that are more logistical in
11 nature where you might be finding vendors to print boards in
12 Texarkana and you would charge that under product management,
13 not you weren't consulting, but because you were doing
14 something that you didn't want to charge that high rate for.

15 Q. Have you had an opportunity to look through Ms. Kadden's
16 time sheets in connection with this lawsuit?

17 A. Yes.

18 Q. And do you know how she described the majority of her work?

19 A. As consulting.

20 Q. Did there come a point in time in Visualex's existence that
21 you decided to change the compensation scheme for the
22 professional staff?

23 A. Yes.

24 Q. And when was that?

25 A. It was in, I think, March of 2009.

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1 Q. Can you explain for me the reason that Visualex made the
2 business decision to change the compensation structure for the
3 professional staff?

4 A. Yes. That was right about the time when the economy took a
5 downturn and it was pretty much unprecedented in the legal
6 industry the ramifications that that had on the legal industry.
7 So attorneys weren't getting cases and, therefore, we weren't
8 getting cases because we work with attorneys. That, coupled
9 with a case that we had done where the invoice was about
10 \$180,000 and the ultimate client, SGI, went bankrupt, Silicon
11 Graphics, and the law firm informed us that they would not be
12 paying the bill because their client hadn't paid them, and
13 about \$80,000 of that invoice was direct expenses, equipment
14 rental, hotel rooms, things that I had paid out of pocket.

15 And so not only were we not going to receive \$180,000
16 that we were expecting to receive, but 80,000 of that was
17 out-of-pocket expenses. And so that, coupled with the fact
18 that in 2009 the first three months we had the worst three
19 months of our entire history, we really had no active cases and
20 no billable work, we had to sit down, the three owners, and
21 have some difficult conversations about where -- are we going
22 to be able to weather this storm? If so, what do we need to do
23 in order to get through the other side.

24 Q. Can you tell me, before changing the compensation scheme,
25 what, if anything, did you do?

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1 A. The first thing we did is the two owners, Brian and myself,
2 who drew salaries because we actually work in the company,
3 also, dropped drawing salaries. And we actually -- that's
4 still in practice right now. We have not drawn salaries since
5 last November. But that wasn't enough.

6 THE COURT: You mean November '11?

7 THE WITNESS: '11, yeah.

8 A. And we waited to see how -- if that was going to make any
9 difference, but you want to be able to make payroll. You have
10 to make payroll. If there is no money coming in, you have to
11 start evaluating other areas. So we made a very, very
12 difficult decision to lay off one of our designers.

13 Q. Ms. Romano, I'm sorry. Maybe I didn't hear. You stopped
14 drawing salaries before or after the change?

15 A. Before.

16 MR. RISK: Object to this line on the grounds of
17 relevance.

18 THE COURT: I heard it all in opening statement.
19 That's their theory, this is what they call incentive pay, not
20 overtime, and they couldn't afford incentive pay anymore. I am
21 not sure I see the relevance either. Maybe it goes to good
22 faith. I don't know. But I'm listening to it.

23 Q. In response to the Court's inquiry, I believe --

24 A. We are still not.

25 THE COURT: She said starting November 2011 --

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1 THE WITNESS: I'm sorry. I misunderstood. We have
2 not drawn a salary since -- in other words, I have not.

3 THE COURT: You said that, November 11, 2011.

4 THE WITNESS: It started back -- I think we stopped
5 taking salaries in January of 2009. I'm still not taking a
6 salary is basically what I'm saying.

7 THE COURT: Why did you bother telling me about 2011,
8 November? What was the point of that?

9 THE WITNESS: In other words --

10 THE COURT: Now you are saying since January '09 you
11 have not taken a salary?

12 THE WITNESS: In other words, when money came in, we
13 would draw some, but we are behind in salary since -- we are
14 behind in salary since November of 2011. We stopped taking a
15 consistent salary, I guess I should say, in 2009.

16 THE COURT: But you paid yourselves at intervals since
17 January 2009.

18 THE WITNESS: Yes.

19 Q. What, if anything, else did Visualex do at that time before
20 considering the change for the staff?

21 A. We laid off a designer.

22 Q. Were there any other changes made?

23 A. Yeah. That still wasn't enough. And you get to a point
24 when you're in the business that we are in that you have to
25 have enough staff to be able to handle cases when they came in,

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1 and we hoped that they would start coming in again. So we had
2 gotten lean as we felt we could on the employee side. And so
3 then we started looking at leases. Could we renegotiate
4 leases. We put a hold on all software and hardware purchasing,
5 those kinds of things.

6 MS. KLEIN: I'll come back to this, your Honor,
7 because it's going to get into the issue of the attorney-client
8 privilege. For now if I can skip this and then I'll come back
9 in just a couple of minutes.

10 Q. Before we get to some additional questions on that, I would
11 like to talk about, is there a difference between the way
12 compensation is paid to the professional and nonprofessional
13 staff?

14 A. Yes.

15 Q. Is there different benefits, paid time off, that sort of
16 thing?

17 A. Yes.

18 Q. What types of I'll call them perks or things does the
19 professional staff get that the nonprofessional staff does not
20 get?

21 A. They get what we call comp time, which is if you work a lot
22 of hours, we say take the day off and just put it down as comp
23 time, you don't have to come to work, but obviously you're
24 still getting paid for it.

25 Q. Did Ms. Kadden, was she given comp time?

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1 A. Yes.

2 Q. Would she have gotten that comp time if she was not an
3 exempt employee?

4 A. No.

5 Q. Are there any other types of things that exempt staff gets
6 that nonexempt doesn't?

7 A. Well, what do you mean, any types of things?

8 Q. Are there any other distinguishing factors in the amount of
9 their compensation, things of that sort?

10 A. The professional staff obviously have much higher salaries
11 than the nonprofessional staff.

12 Q. Do you know approximately how much different?

13 A. Considerably different, 30 or \$40,000.

14 Q. You've had an opportunity to review Ms. Kadden's time
15 sheets?

16 A. Yes.

17 Q. Were there times that she improperly characterized her paid
18 time off?

19 A. Yes.

20 Q. Can you just give us an example of that?

21 A. I think there was a time where she characterized something
22 as holiday and it wasn't a holiday. There was times when she
23 characterized something as sick time and it said, you know, car
24 trouble. There are times she put things down administrative
25 time and it was snow day. She couldn't get in because of the

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1 snow.

2 Q. Were the other employees, did they report to work on those
3 days?

4 A. On -- sometimes -- there is a difference between when there
5 was a snow day and we closed the office and there was a day
6 when there was snow and the office was opening and other people
7 were there and Adina was not able to make it in because she
8 lived pretty far away.

9 Q. For all of this time that you have now seen was improperly
10 entered, was she compensated?

11 A. Yes.

12 Q. Would she have been compensated if she was an hourly
13 employee?

14 A. No.

15 MS. KLEIN: Your Honor, at this time, in light of the
16 fact we are not going to make the decision about the work, the
17 only way I see it is for me to question the witness about the
18 good faith. And if that's the case, I guess maybe we should go
19 off of the record for a couple of seconds and I give the
20 documents to Mr. Risk. Is that appropriate? I want him to
21 have an opportunity to see it.

22 THE COURT: Sounds good.

23 MS. KLEIN: Your Honor, can I ask one very specific
24 thing. Obviously, the attorney-client privilege is such a
25 highly important privilege. Is the waiving of it limited to

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1 the issue concerning --

2 THE COURT: It is, absolutely. It's a narrow waiver.
3 It's limited solely to the document or documents that we have
4 already discussed and I've ruled on. That's it. It is court
5 ordered.

6 MS. KLEIN: It's not an open waiver?

7 THE COURT: No.

8 MS. KLEIN: Thank you, your Honor.

9 Mark, do you want to take a break and see the
10 documents or do you want to see the doctor?

11 MR. RISK: May we take a five-minute break, your
12 Honor?

13 THE COURT: I guess so.

14 (Recess)

15 THE COURT: Are we ready?

16 MS. KLEIN: Yes.

17 MR. RISK: I just got the documents.

18 THE COURT: I'm just asking.

19 MR. RISK: Sorry, your Honor. Ms. Klein can proceed.
20 I have given them the once over.

21 THE COURT: Good. Okay.

22 Q. Ms. Romano, was there any time during Ms. Kadden's
23 employment that she was not allowed to interact with clients?

24 A. No.

25 Q. Were there any restrictions on her acting as a consultant?

C8DMKADT

Romano - direct

1 A. No.

2 Q. Did she regularly, as part of her duties and
3 responsibilities, review all of the background material that
4 you testified about today in the same manner that you did?

5 A. Yes.

6 Q. Was she expected to consult in the same manner that you
7 did?

8 A. Yes.

9 Q. Was she expected to provide consulting about the images in
10 the same method as Kim Nawyn?

11 A. Yes.

12 Q. Was Kim Nawyn Ms. Kadden's boss?

13 A. No.

14 Q. We talked about before things that led up to your Visualex
15 having to make a business decision to change the compensation,
16 is that correct?

17 A. Yes.

18 Q. And at some point a decision was made?

19 A. Yes.

20 Q. And what was that decision?

21 A. That we were going to suspend paying overtime incentive
22 compensation.

23 Q. And did you do that blindly as a business decision?

24 A. Blindly? I wouldn't say blindly. I weighed all of the
25 options. We weighed all of the options, we meaning the owners.

C8DMKADT

Romano - direct

1 Q. And can you explain to the Court what steps -- let me
2 retract that. Do you believe that graphic consultants are
3 exempt?

4 A. Yes.

5 Q. Can you explain to us why you believe that?

6 A. Because I worked as a graphic consultant myself for 20
7 years and was always paid as an exempt employee. Every other
8 graphic consultant I have ever come in contact with at every
9 company in this industry was paid as an exempt employee.

10 Q. And were there any other reasons? Strike that.

11 So there came a point in time where you made the
12 decision to change the compensation structure?

13 A. Yes.

14 Q. And before doing that did you consult with anybody?

15 A. Yes.

16 Q. Did you take any independent steps?

17 A. Yes.

18 Q. Can you explain to the Court exactly what the process was
19 of what you did?

20 A. Well, the first thing I did was contact an attorney, and
21 really my question at that point was, have these offer letters
22 that say that these at-will employees are going to get overtime
23 compensation because that's in their offer letter, do I have
24 to -- am I allowed to change that?

25 Q. Did you speak with an attorney?

C8DMKADT

Romano - direct

1 A. Yes.

2 Q. Who did you speak with?

3 A. Traycee Klein.

4 Q. And what, if anything, else was discussed?

5 A. Actually, what Ms. Klein told me was that it wasn't an
6 employment contract and that because these professionals were
7 at-will employees that wasn't the issue that I had to be
8 concerned about. I had to make sure that legally that the
9 characterization was correct as exempt employee that I
10 believed.

11 Q. Was that separate and apart from whether or not you had a
12 contract that required you to pay something?

13 A. Yes.

14 Q. And continue explaining to us what happened, to the best of
15 your knowledge.

16 A. To the best of my knowledge -- this is a little bizarre,
17 but Ms. Klein said she was busy and I could go to the
18 Department of Labor and there would be summaries about, you
19 know, what are the things that would characterize an employee
20 as exempt versus nonexempt and that I should review that and,
21 you know, basically there were little, you know, tests you can
22 do to go to the site and complete the test or the checklist.

23 Q. Do you recall whether or not in those conversations, was
24 that the only advice you got or that was just something you
25 started with until we spoke later?

C8DMKADT

Romano - direct

1 A. Just starting with, yes.

2 Q. And did you proceed to the Department of Labor website?

3 A. Yes, I did.

4 Q. And did you follow what I believe is called E laws and the
5 E advisor? Did you go through the tests?

6 A. Yes, I did.

7 MR. RISK: Objection, leading.

8 THE COURT: It's all been leading since this is an
9 area of attorney-client advice, but I think that's appropriate
10 to make sure that the waiver is narrow. It is leading, but I
11 am going to allow it. Go ahead.

12 Q. Did you look for only specific exemptions or did you do it
13 based on just the actual job of the consultant?

14 A. Just the job of it. There was a bunch of different stuff
15 and I actually, from what I remember, I did all of them.

16 Q. And as a result of your own going through that process,
17 what, if anything, did you conclude based on the Department of
18 Labor information?

19 A. I concluded that the characterization as an exempt employee
20 was the correct characterization.

21 Q. And did you at that point just decide to change the
22 compensation?

23 A. No.

24 Q. Was there further inquiry and steps taken?

25 A. Yes.

C8DMKADT

Romano - direct

1 Q. What is the next thing that happened?

2 A. I am not sure if we spoke on the phone, but we did have
3 a -- I think it was both phone conversations and e-mails where
4 you requested that I send you any type of, you know,
5 descriptions, offer letters, any relevant information that
6 would enable you to evaluate it independently of what I had
7 already done.

8 Q. And did you ultimately send information over?

9 A. Yes.

10 Q. And was there any additional verbal discussion about what
11 the job was?

12 A. Yes. There was clarifications of things, sure.

13 Q. And did you explain what the job of the consultant was that
14 Ms. Kadden did?

15 A. Yes.

16 Q. Do you remember what happened next?

17 A. I believe you said you wanted to review it on your own and
18 that you were also going to speak to -- I am not sure if it's
19 somebody else who works at your firm or I know that they had
20 been a prosecutor for the Department of Labor, and you were
21 going to run it by them as well so that they could evaluate the
22 information that I sent.

23 Q. And did you ultimately get information back?

24 A. Yes.

25 Q. And what were you told?

C8DMKADT

Romano - direct

1 A. I was told that it was the correct characterization.

2 Q. As a result of that, did you make any business decisions?

3 A. Yes. We decided to suspend the overtime incentive
4 compensation pay.

5 Q. Did you make that announcement in writing?

6 A. Yes.

7 Q. After that announcement was distributed, what employees did
8 that impact?

9 A. The professional staff, which at the time was Adina Kadden,
10 Kim Nawyn, Lance Sperring and Gerry Mooney.

11 Q. What is Lance Sperring's job?

12 A. Art director.

13 Q. And what is Mr. Moony's job?

14 A. Director of motion graphics.

15 Q. And Kim Nawyn?

16 A. Consultant.

17 Q. And the same position as Ms. Kadden?

18 A. Yes.

19 Q. After that announcement was made, was there an
20 understanding that employees from that point forward would only
21 work 40 hours a week?

22 A. No. And it wasn't just -- sorry to interrupt, but it
23 wasn't that I just put a letter in somebody's paycheck. I
24 called each one individually into my office, handed them the
25 written communication, and I explained to them why we were

C8DMKADT

Romano - direct

1 doing it and that it was a difficult decision, but explained
2 exactly why we had made the decision.

3 Q. And did you have a conversation with Ms. Kadden?

4 A. Yes.

5 Q. And do you recall advising her during that discussion that
6 her annualized base salary was going to cover all of her hours
7 worked?

8 A. Yes.

9 MR. RISK: Objection, leading.

10 THE COURT: We discussed that. It is leading, but
11 because it's the advice, I'm allowing it.

12 MR. RISK: If I may, your Honor, this goes to the
13 conversation between Ms. Romano and Ms. Kadden, and a predicate
14 is being laid that's going to be of legal significance.

15 THE COURT: Objection to leading, now that you are
16 turning to that conversation, is sustained.

17 Would you rephrase. You're going to basically ask her
18 what she said and what the other party said in the
19 conversation.

20 Q. Can you tell us what happened at that meeting?

21 A. Generally, yes. I don't obviously remember the exact words
22 that were spoken. It was several years ago. But what I
23 explained is that, you know, when times were good and we were
24 able to pay incentive compensation, we did so, and we did so
25 happily because we knew we wanted to keep employees, and we

C8DMKADT

Romano - direct

1 wanted to make sure they were incentivized along the way. But
2 that when we didn't -- we no longer had the money to be able to
3 make payroll, basically, let alone the additional incentive
4 compensation, that we were all going to have to tighten our
5 belts to get through this.

6 Q. And what did you understand or Visualex understand at that
7 point the \$75,000 was going to be for?

8 A. For her duties that she performed as a consultant for the
9 year.

10 Q. Was it restricted in any way based on the amount of time
11 she worked?

12 A. No.

13 MS. KLEIN: Your Honor, I have no further questions.

14 THE COURT: Mr. Risk.

15 MR. RISK: Your Honor, I have some cross-examination.
16 I would like to have the night to think of some cross --

17 THE COURT: I'm sure you won't finish the rest of it
18 in one hour. We don't even have an hour. We have 45 minutes.

19 MR. RISK: Can I take two minutes before we start the
20 cross?

21 THE COURT: Didn't you just have a break?

22 MR. RISK: I did.

23 THE COURT: We are going to be stopping early. I
24 don't think I can stay until quarter after. We are going to
25 stop at 4, quarter after, for the reasons previously discussed.

C8DMKADT

Romano - direct

1 CROSS-EXAMINATION

2 BY MR. RISK:

3 Q. Ms. Romano, you have a bachelor's degree from CW Post
4 College?

5 A. Correct.

6 Q. In psychology?

7 A. Correct.

8 Q. You have a master's degree from Hofstra University?

9 A. Correct.

10 Q. In applied research and evaluation?

11 A. Correct.

12 Q. You obtained that in one year?

13 A. Yes.

14 Q. And applied research and evaluation is industrial
15 psychology, is that right?

16 A. It was in the industrial psychology program, yes.

17 Q. And that's the scientific study of employees, workplaces
18 and organizations?

19 A. Yes.

20 Q. Then you took some education courses after that to be a
21 teacher?

22 A. Yes.

23 Q. And you have no schooling after that?

24 A. No.

25 Q. You have worked for many years in litigation graphics

C8DMKADT

Romano - cross

1 consulting?

2 A. Yes.

3 Q. First at Litigation Sciences?

4 A. Yes.

5 Q. And then at FTI?

6 A. Yes. Well, Pixel before FTI.

7 Q. Then at Pixel and then at FTI?

8 A. Yes.

9 Q. In 2000, you formed Visualex, started Visualex?

10 A. In 1999, the end of 1999.

11 Q. And you're the senior graphics consultant at Visualex?

12 A. Yes.

13 Q. Your hourly rate is higher than the hourly rate of the
14 other consultants?

15 A. Yes.

16 Q. It's by about \$100?

17 A. Yes.

18 Q. And then your rate for services after 6:00 or on the
19 weekend would be 50 percent higher than your regular rate?

20 A. Yes.

21 Q. So that's in the high fours?

22 A. Tell me that again.

23 THE COURT: What is your regular rate?

24 THE WITNESS: 325. I never charge premium for my
25 time.

C8DMKADT

Romano - cross

1 THE COURT: You don't charge premium?

2 THE WITNESS: I don't.

3 Q. Your rate for consulting activities was 325 when Ms. Kadden
4 was with Visualex, is that right?

5 A. Yes.

6 Q. And her rate for consulting activities was 225?

7 A. Yes.

8 Q. Now, the clients of Visualex are principally law firms?

9 A. Yes.

10 Q. And some are major law firms?

11 A. Yes.

12 Q. And some of the litigation Visualex works on are large
13 litigations?

14 A. Yes.

15 Q. Your clients include Stroock Stroock & Lavan?

16 A. Yes.

17 Q. King & Spalding?

18 A. Yes.

19 Q. Dechert?

20 A. Yes.

21 Q. Paul Hastings?

22 A. Yes.

23 Q. Williams & Connolly?

24 A. Yes.

25 Q. DLA Piper?

C8DMKADT

Romano - cross

1 A. Yes.

2 Q. And these are not only firms located in New York, is that
3 right?

4 A. That's correct.

5 Q. You have clients, major law firms in other cities around
6 the country?

7 A. Correct.

8 Q. And Visualex supplies litigation graphics for cases being
9 tried all over the country?

10 A. Yes.

11 Q. You supplied graphics recently for a case that was tried in
12 France, is that right?

13 A. For an arbitration, yes.

14 Q. In 2008, you retained the Cowen Group to find you a new
15 graphics consultant?

16 A. Yes.

17 Q. Cowen Group worked for Visualex?

18 A. No.

19 Q. Well, they were hired -- go ahead.

20 A. Do you understand what a headhunter is? You don't hire
21 them. We basically had three or four headhunters. They send
22 you candidates. Once you choose one of their candidates, you
23 pay them a fee, but you don't hire them.

24 Q. You paid a fee --

25 A. If you choose one of the candidates.

C8DMKADT

Romano - cross

1 THE COURT: You did.

2 THE WITNESS: Yes.

3 Q. And Visualex prepared a job description for the position?

4 A. Yes.

5 Q. And then gave it to the Cowen Group?

6 A. Yes.

7 Q. Did you also give it to others?

8 A. The job description? I don't think so.

9 Q. Is it the same job description that in 2009 you showed to
10 Ms. Klein when you consulted counsel about whether you had to
11 pay overtime to the graphics consultants?

12 A. There are a couple of job descriptions. I don't know if it
13 was that particular one. It was whatever one I had on my
14 computer. But it probably was, yes.

15 MR. RISK: Your Honor, may I approach the witness to
16 show her Plaintiff's Exhibit 2? That's going to require me to
17 show one to the Court as well. Should I hand you my book or
18 you will just take Plaintiff's 2?

19 THE COURT: Whatever.

20 MR. RISK: I'll give you one book at a time.

21 THE COURT: Okay.

22 Are you going to be offering Plaintiff's Exhibit 2?

23 MR. RISK: Yes, I am.

24 THE COURT: Any objection, Ms. Klein?

25 MS. KLEIN: I would just ask the witness if she wrote

C8DMKADT

Romano - cross

1 this document.

2 THE COURT: Let's start with, do you recognize this
3 document?

4 THE WITNESS: I recognize it because I have seen it in
5 the production.

6 MR. RISK: Your Honor, may I be heard on this?

7 THE COURT: I don't know that anybody has to be heard
8 yet.

9 You do recognize it?

10 THE WITNESS: Yes.

11 THE COURT: Is it a Visualex document?

12 THE WITNESS: Yes.

13 THE COURT: It's prepared by your company?

14 THE WITNESS: Um-hum.

15 THE COURT: It's going to be admissible.

16 MS. KLEIN: I have no objection.

17 THE COURT: Exhibit 2 is received.

18 (Plaintiff's Exhibit 2 received in evidence)

19 THE COURT: You didn't personally draft it.

20 THE WITNESS: I don't think I did.

21 MR. RISK: It's covered in admissions that I will
22 introduce later.

23 THE COURT: What's covered in admissions?

24 MR. RISK: The relationship between Ms. Romano and
25 Exhibit 2.

C8DMKADT

Romano - cross

1 THE COURT: What was the relationship between the two?
2 Tell me now because she is not denying it's a Visualex
3 document. That's the defendant in this case and therefore it's
4 a statement of the defendant and therefore it's admitted. I
5 don't understand.

6 MR. RISK: I'll proceed.

7 Q. Ms. Romano, do you see about halfway down Exhibit 2 it
8 says: While we prefer applicants with experience in the field,
9 we are willing to train strong candidates?

10 A. Yes.

11 Q. And that's the field of litigation graphics?

12 A. Yes.

13 Q. And Ms. Kadden, who was ultimately hired, had experience in
14 the field?

15 A. Yes.

16 Q. And Kim Matthiesen --

17 A. Nicole Matthiesen.

18 Q. Nicole Matthiesen, who was a graphics consultant prior to
19 Ms. Kadden, she had experience in the field?

20 A. Yes.

21 Q. I'd like to show you another document that's been marked as
22 Plaintiff's Exhibit 12.

23 MR. RISK: Your Honor, I think that's already in under
24 another name.

25 THE COURT: It is. I recognize it. It is. What's

C8DMKADT

Romano - cross

1 the question about it?

2 MR. RISK: I have to find my copy, your Honor.

3 THE COURT: This is the gal who has got a master's in
4 English literature?

5 MR. RISK: Yes.

6 Q. Let me give you the official one, Ms. Romano. I'm sorry.

7 Ms. Matthiesen had experience in trial graphics?

8 A. Yes.

9 Q. She had that over two years, between 2004 and 2006?

10 A. Yes.

11 Q. And she worked on a major litigation, didn't she?

12 A. Yes.

13 Q. And what litigation was that?

14 A. The U.S. v. Jeffrey Skilling and Kenneth Lay case.

15 Q. That's the Enron litigation, isn't it?

16 A. Yes.

17 Q. And she worked on graphics for the prosecution in that
18 lawsuit?

19 A. Yes.

20 MS. KLEIN: Your Honor, I object. The document speaks
21 for itself.

22 THE COURT: It does. I don't know why anybody wants
23 to waste my time.

24 MR. RISK: I won't, your Honor.

25 THE COURT: Good. It says right there, most recently

C8DMKADT

Romano - cross

1 worked as primary consultant with the prosecution in U.S. v.
2 Jeffrey Skilling and Kenneth Lay, right there.

3 Q. I am going to show you Exhibit 9. I put before you Exhibit
4 9, Ms. Romano.

5 THE COURT: This is also in evidence under a different
6 exhibit number, but this is the Kim Nawyn résumé.

7 MR. RISK: Right.

8 Q. I don't think we talked about it on your direct exam, but
9 Ms. Nawyn has experience in the field as well, doesn't she?

10 A. Yes.

11 Q. She worked at Doar?

12 A. Correct.

13 Q. Immediately prior to her joining Visualex?

14 A. That's correct.

15 Q. And I am going to put before you what's been marked as
16 Plaintiff's Exhibit 3.

17 THE COURT: You are offering this, right?

18 MR. RISK: Yes, your Honor.

19 THE COURT: Any objection to 3? That's the offer
20 letter, offer letter signed by Ms. Romano, accepted by Ms.
21 Kadden. Any objection?

22 MS. KLEIN: No, your Honor.

23 THE COURT: 3 is received.

24 (Plaintiff's Exhibit 3 received in evidence)

25 Q. Turning to the second page of Exhibit 3, there are some

C8DMKADT

Romano - cross

1 bullet points listing some job duties, Ms. Romano. You see
2 where it says all new employees are subject to a three-month
3 probationary period and later it says: By that time you will
4 be expected to be at least 50 percent billable, able to fulfill
5 the following job requirements with minimal supervision.

6 You see that?

7 A. Yes.

8 Q. The first bullet point: Take direction directly from
9 clients on revisions to existing graphics as well as additional
10 graphics that may be requested.

11 Is that a skill that Visualex can train someone
12 without experience?

13 THE COURT: You are asking her that? I'm sorry. Wait
14 a minute. Forget that I said that. That is the correct person
15 to ask. Forget that I said that.

16 Can you answer that?

17 THE WITNESS: Yes.

18 A. What we train our consultants to do is to be able to filter
19 what clients tell them and then decide how you are going to
20 proceed on that. That's the whole thing that I explained going
21 through the graphics is that, yes, part of what we do is we
22 have to make sure that every client, no matter who they talk
23 to --

24 THE COURT: That wasn't his question. The question
25 is, can you train someone with no experience to do that?

C8DMKADT

Romano - cross

1 THE WITNESS: Yes.

2 Q. I'm really going back to Visualex's statement in Exhibit 2
3 that we are willing to train strong candidates. Communicate
4 these revisions, additions accurately to the art directors.
5 Was that something Visualex can train a strong candidate with
6 no prior experience in the field?

7 A. Yes.

8 Q. Proofread the creative layouts with zero tolerance for
9 errors, that's something Visualex can train a candidate with no
10 prior experience?

11 A. Yes.

12 Q. Follow-up to ensure that client deadlines and requests are
13 met. If the candidate is the appropriate candidate, Visualex
14 can train them in that?

15 A. Yes.

16 Q. Be sure that you manage client's expectations and
17 communicate the urgency of deadlines to the staff. Is that a
18 duty that Visualex can train an appropriate candidate with no
19 experience?

20 A. Yes.

21 Q. Demonstrated ability to proactively provide solutions to
22 unexpected problems that may arise during a project that allow
23 a deadline to be met. That skill you can train the appropriate
24 candidate who lacks prior experience?

25 A. Honestly, my honest reaction to that is, you can try to

C8DMKADT

Romano - cross

1 train somebody, but you have to have a knack for that. Either
2 you're a proactive person or you are not. If you're not a
3 proactive person, I can't make you be one.

4 Q. How about the next bullet point, provide the requisite
5 leadership and accurate instructions/information to the studio
6 to ensure an efficient flow of work product so that all
7 deadlines can be met using the appropriate amount of billable
8 time. Is that something that Visualex can train an appropriate
9 candidate with no prior experience in the field?

10 A. Again, I think if -- it's the same thing. I can try to
11 train them. Whether or not they are trainable is a question.
12 So, yes.

13 Q. So a candidate without prior experience in the field could
14 be hired by Visualex and you would attempt to train them in
15 that bullet point?

16 A. Absolutely.

17 Q. Turning to the bullet points in Plaintiff's Exhibit 2,
18 unless I took that away from you, Ms. Romano. I hope I didn't.

19 MS. KLEIN: Your Honor, I would like to note my
20 objection to this entire line is calling for speculation.

21 THE COURT: No. She is running the company. I'll
22 allow it.

23 Anyway, it has to do with this whole issue of this
24 so-called requirement. It's not speculation and it is
25 relevant.

C8DMKADT

Romano - cross

1 Do you have Exhibit 2?

2 THE WITNESS: Yes.

3 Q. You see the bullet points, Ms. Romano, below the heading
4 primary responsibilities?

5 A. Yes.

6 Q. Look at the first bullet point. I'll read it with you:
7 Read case materials and work with attorneys to identify key
8 case concepts. Is that something Visualex can train a strong
9 candidate without prior experience?

10 A. We can attempt to train them, sure.

11 Q. The next bullet point: Collaborate with our team of
12 designers and animators to execute high-quality, error-free
13 graphics. Is that something that Visualex is willing to train
14 a strong candidate without prior experience in the field?

15 A. Yes.

16 Q. And the third one: Schedule trial technicians and
17 courtroom equipment, that's something Visualex can train a
18 candidate without prior experience in the litigation graphics
19 field?

20 A. Yes.

21 Q. Finally, project management and client interaction, that's
22 something that Visualex is willing to try to train strong
23 candidates without prior experience in the field?

24 A. Yes.

25 Q. You see a little bit below, Ms. Romano, in Exhibit 2, it

C8DMKADT

Romano - cross

1 says: This is not, in all capitals, a graphic design position?

2 A. Yes.

3 Q. There is no dispute that Ms. Kadden is not a graphics
4 designer?

5 A. None whatsoever.

6 Q. Not trained as one?

7 A. No.

8 Q. Not qualified to be one?

9 A. Right.

10 Q. And the graphic designers at Visualex have a different kind
11 of education, don't they?

12 A. Yes.

13 Q. They have bachelor's degrees in graphics fields?

14 A. Yes.

15 Q. And what would those fields be, graphics?

16 A. Design.

17 Q. Graphics design, animation?

18 A. Yes.

19 Q. Medical illustration?

20 A. Yes.

21 Q. Or related graphics fields?

22 A. Yes.

23 Q. Do all your designers have a degree in graphics or a
24 related art field?

25 A. Yes.

C8DMKADT

Romano - cross

1 Q. Would you high hire someone as a graphic designer who
2 didn't?

3 A. I would have to see what they bring to the table.

4 MS. KLEIN: Your Honor, I would like to note my
5 objection. It's irrelevant. The regs and the statute, it
6 doesn't require that every employee have an advanced degree.
7 It's why was Ms. Kadden hired. That's what the regulations --

8 THE COURT: I don't understand most of that argument.
9 It doesn't matter. I don't know. You said the graphic
10 designers?

11 MR. RISK: Yes.

12 THE COURT: Why do I care about the designers?

13 MR. RISK: Because Visualex is arguing the creative
14 exemption for Ms. Kadden, based on her relationship to the
15 slides, and I'm making a record that she is not a designer and
16 the designers have graphics degrees.

17 THE COURT: She will right now stipulate that she is
18 not a designer, right?

19 MS. KLEIN: Correct. She is not a graphic artist.

20 THE COURT: She is not a graphic artist and they don't
21 have to have a graduate degree.

22 MS. KLEIN: Maybe some of them.

23 THE COURT: To the extent it is part of this case
24 because he wants to argue it, some do some don't and she is not
25 a graphic artist or designer.

C8DMKADT

Romano - cross

1 MS. KLEIN: Correct.

2 Q. Who is Heather Moran?

3 A. She was a graphic consultant.

4 MS. KLEIN: Your Honor, I am going to object to this
5 line of questioning. It's irrelevant.

6 THE COURT: Overruled. She is the replacement.

7 THE WITNESS: Right.

8 THE COURT: She earns \$75,000 so she doesn't get
9 overtime. She is considered by you exempt. We get all that.
10 She has no advanced degree. She is the paralegal.

11 THE WITNESS: Right.

12 MR. RISK: Your Honor, you're making it look easy.

13 THE COURT: We should be going faster than we are.
14 I'm not blaming you. Ms. Klein should have gone faster, I
15 should make you go faster, everything should happen faster, but
16 it's not that way today.

17 MR. RISK: I am going to try to go a little faster by
18 giving the witness Exhibits 13 and 14 together.

19 THE COURT: 13 is Ms. Moran's offer letter, right?

20 THE WITNESS: Yes.

21 THE COURT: And 14 is her résumé, right?

22 THE WITNESS: Correct.

23 THE COURT: You are offering both?

24 MR. RISK: Yes.

25 MS. KLEIN: Your Honor, I do object because they are

C8DMKADT

Romano - cross

1 irrelevant.

2 THE COURT: Overruled. Go ahead. 13 and 14, they are
3 both received.

4 (Plaintiff's Exhibits 13 and 14 received in evidence)

5 Q. You hired Ms. Moran in March of 2011?

6 A. Yes.

7 Q. She started with Visualex within a couple of days after you
8 terminated Ms. Kadden?

9 A. Yes.

10 Q. Moran had no prior experience in the graphics consulting
11 field?

12 A. No.

13 Q. She was a paralegal?

14 A. Yes.

15 Q. She had no advanced degree?

16 A. No.

17 Q. You decided, as we discussed, that Ms. Moran was a strong
18 candidate that you were willing to train?

19 A. No. I decided to hire Heather Moran.

20 Q. Well, back to Exhibit 2, we prefer applicants with
21 experience in the field. We are willing to train strong
22 candidates.

23 Ms. Moran had no experience in the field?

24 A. That's correct.

25 Q. So you decided you would train her along the lines we

C8DMKADT

Romano - cross

1 discussed?

2 A. I decided to hire her, yes.

3 THE COURT: If you hired her you had to train her,
4 right.

5 THE WITNESS: Yes.

6 Q. You interviewed her?

7 A. Yes.

8 Q. You made the hiring decision?

9 A. Yes.

10 Q. You told her you would train her?

11 A. Yes.

12 Q. And you thought she was a strong candidate?

13 A. You don't know what I thought.

14 THE COURT: He is asking that question. He meant to
15 say, did you think she was a strong candidate, yes or no?

16 THE WITNESS: I thought that she was someone that I
17 was willing to hire. I don't know that I would consider her a
18 strong candidate, but she was someone that I thought that could
19 fill a void at that point in time.

20 Q. Well, you knew that she would have to be trained in your
21 field?

22 A. Everyone has to be trained in my field.

23 THE COURT: Even if they have done it for ten years at
24 competing companies?

25 THE WITNESS: They have to be trained the way we do

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Romano - cross

1 it. We do it a little bit differently.

2 Q. How do you do it differently?

3 A. As I explained previously, the way we separate ourselves is
4 that we are not wrists and we are true consultants, and there
5 is more to it than just being able to regurgitate what a client
6 is asking for. You have to be able to assess, evaluate,
7 recommend.

8 Q. Turning back to Exhibit 2, under qualifications, do you see
9 the bullet point, graduate degree referred, e.g., social
10 sciences law, et cetera?

11 A. Yes.

12 Q. So Visualex at the time of the search for Ms. Kadden's
13 position, Visualex preferred a graduate degree?

14 A. Yes.

15 Q. And examples of the graduate degrees you preferred were law
16 and social science?

17 A. Yes.

18 Q. And there is an et cetera there. What does et cetera mean?

19 A. Nicole Matthiesen had a graduate degree in English.
20 Obviously, she is articulate, she can formulate, craft titles,
21 articulate what needs to be communicated, so a graduate degree
22 in a field that is going to give you the skill sets that you
23 need to perform this job.

24 Q. Kim Nawyn's degree, master's degree was in criminal
25 justice?

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Romano - cross

1 A. Correct.

2 Q. Is that the study of the criminal justice in the penal
3 system?

4 A. I assume so. I never took a criminal justice, but I assume
5 so.

6 Q. And is that within the category of graduate degrees that
7 Visualex prefers?

8 A. Yes.

9 Q. And how about sociology?

10 A. Yes.

11 Q. How about political science?

12 A. Yes.

13 Q. How about economics?

14 A. Yes.

15 Q. How about history?

16 A. Yes.

17 Q. How about art history?

18 A. I mean, you can name any graduate degree. When I evaluate
19 a candidate, obviously, the graduate degree shows that they
20 have the critical thinking necessary to be able to evaluate
21 materials, understand complex concepts, and come up with ways
22 of communicating those complex concepts to the trier of fact.

23 Q. You would consider someone with a Ph.D.?

24 A. Of course.

25 Q. In natural sciences?

C8DMKADT

Romano - cross

1 A. I don't know. I would have to look at the candidate. I
2 can't make this in a vacuum.

3 Q. It would depend on the individual candidate?

4 A. Of course.

5 Q. And if that candidate had experience in litigation graphics
6 consulting, that would be a plus factor?

7 A. Yes.

8 Q. And if they had the right experience in litigation graphics
9 consulting, you might take their Ph.D. in mathematics into
10 account in that context?

11 A. I take the entire package into consideration.

12 Q. You're looking at the whole person?

13 A. Yes.

14 Q. Education and experience?

15 A. Yes.

16 Q. And you prefer experience in the graphics consulting field?

17 A. Yes.

18 Q. And you prefer a graduate degree?

19 A. Yes.

20 Q. In Ms. Moran's case you looked at the whole package and
21 found her a good candidate?

22 A. Yes.

23 Q. Even though she had no graduate degree?

24 A. She was taking graduate courses, yes. So I thought she was
25 advancing her education.

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Romano - cross

1 Q. And no experience in litigation graphics consulting?

2 A. But she had experience in the litigation industry, so I
3 thought that was a plus.

4 Q. As a paralegal in companies and law firms?

5 A. Uh-huh. And she also had graphics courses as well, so that
6 was another added thing to consider.

7 Q. Is Exhibit 3 still before you, Ms. Romano, or should I
8 assist you?

9 A. I don't think --

10 THE COURT: It's the offer letter to Ms. Kadden.

11 Q. I would like you to look at Exhibit 3, Ms. Kadden's offer
12 letter against Exhibit 13, Ms. Moran's offer letter.

13 THE COURT: What's the difference, Mr. Risk? They are
14 both in evidence.

15 MR. RISK: They are almost exactly the same.

16 THE COURT: Point out the difference to me.

17 MR. RISK: Sorry, your Honor?

18 THE COURT: Point out the difference to me.

19 MR. RISK: The difference is --

20 THE COURT: Looks like the two personal days.

21 MR. RISK: I think the difference is, real difference
22 is on the overtime, your Honor, if you are asking me.

23 THE COURT: I am asking you. The documents are in
24 evidence. Personal days and vacation days look different.

25 MS. KLEIN: Your Honor, I believe the biggest change

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Romano - cross

1 is the second paragraph.

2 THE COURT: Second paragraph on the first page?

3 MS. KLEIN: Yes.

4 THE COURT: I see that. Okay.

5 Q. Ms. Romano, these offer letters were almost exactly the
6 same, aren't they?

7 A. Yes.

8 Q. Ms. Moran was hired for the same position that Ms. Kadden
9 occupied?

10 A. Yes.

11 Q. Ms. Romano, there are two consultants assigned to every
12 matter at Visualex, is that right?

13 A. At least two.

14 Q. One performs a lead role, right?

15 A. No.

16 Q. The other provides backup support, right?

17 A. No.

18 THE COURT: When there is two assignments, is there
19 any difference between the two?

20 THE WITNESS: As I previously testified, one is the
21 primary contact with the attorney who has that name, but that
22 is the purpose of putting the three names, that everybody is
23 smart is on the case. Just like I'm on the case, there is a
24 name that you have to call. If I'm not there, it goes to
25 whoever else is there.

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Romano - cross

1 MR. RISK: Sorry, your Honor. I have a document on
2 this.

3 Q. I'd like to show the witness Defendant's Exhibit A.

4 MR. RISK: Your Honor doesn't have one.

5 THE COURT: My clerk does. We got books this morning,
6 so it should be okay. Thank you.

7 Q. Take a moment, Ms. Romano, to familiarize yourself with
8 Exhibit A. Let me know when you are ready for a question.

9 A. Okay.

10 Q. Exhibit A is a proposal that Visualex prepared for the
11 Stroock law firm, is that right?

12 A. That's correct.

13 Q. And it provides a detailed account of the work Visualex
14 does and how it does it?

15 A. No. It's in response to a request for a proposal and it's
16 a specific response to the questions that were asked in the
17 request for a proposal. It has nothing to do with how we do
18 our work for other clients other than Stroock.

19 Q. Well, can you look at page VIS 00350, about midway through
20 the packet.

21 A. Yes.

22 Q. You prepared Defendant's Exhibit 8, didn't you, Ms. Romano?

23 A. Actually, it was a very collaborative effort. As I recall,
24 all of the consultants, myself, Adina, and Kim helped put it
25 together, the art directors were involved. It was a huge

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Romano - cross

1 undertaking.

2 Q. Heavily vetted, passed around between a lot of your people.

3 THE COURT: Obviously, I see that the first sentence
4 on that page says: Two consultants are assigned to every
5 matter, one performed a lead role and the other provided backup
6 support.

7 THE WITNESS: It's at least two because I only bill
8 for two, but there is actually internally all three consultants
9 are reading the documentation. I just didn't want them to
10 think that I was going to overstaff the case. I am trying to
11 get their work.

12 THE COURT: I understand.

13 As bad luck would have it, we do need to stop a little
14 earlier today. Usually we go to 4:30, but we have to stop.
15 See you tomorrow, hopefully at 10:00 tomorrow morning.

16 (Adjourned to Tuesday, August 14, 2012, at 10:00 a.m.)
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